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

SUNSHINE LAW OPINIONS
(DECEMBER 1987 UPDATE)
Hawaii Sunshine Law Opinions

A Keyword Index

Ian Y. Lind

A Common Cause/Hawaii
Special Report
September 1986
INTRODUCTION

This index has been compiled as a quick reference for those who are concerned with open government and access to public meetings and records in the State of Hawaii. I hope that it will prove useful to journalists, citizen activists, students, attorneys, public officials, and others who occasionally need quick answers to questions of what is properly open to the public under Hawaii's Sunshine Law, Chapter 92, HRS.

The index includes opinions issued by the state Attorney General and the county attorneys in Honolulu, Maui, and Hawaii counties, as well as policy statements issued by state and county agencies. Some of these opinions were issued formally, while others were issued in the form of letters responding to particular public inquiries. Most of the letter opinions were gathered from the files of Common Cause or the Sunshine Law Coalition of Hawaii, and the resulting list of informal opinions included in this index cannot be considered exhaustive.

The index also includes listings of the few Sunshine Law cases which have been filed in state courts. The primary emphasis, however, is on opinions from other sources.

Part I contains a keyword index to the opinions. Each
entry consists of a keyword, the date that the opinion was issued, and a single-line summary. Keywords are arranged alphabetically. Each opinion appears in Part I under at least two keywords entries. Dates are presented in the form "year/month/day" due to the requirements of the computer software which was used.

Part II contains brief abstracts of each opinion arranged chronologically from earliest to most recent. In addition, each entry indicates the source of the opinion. Formally issued opinions are identified by number, and an attempt has been made to provide sufficient contextual detail to allow informal or letter opinions to be easily identified.

Users will normally refer to the keyword index in Part I to find opinions of interest, and then look up each relevant opinion in Part II by date. Copies of most of the opinions referred to in this index are on file at the offices of Common Cause/Hawaii.

CAUTION

A few cautionary notes are in order. First, it is important to keep in mind that most of these "opinions" are just that--opinions issued by government agencies to justify their actions. Their legal merit would appear to vary widely, and it is difficult to predict how well they would stand up to judicial scrutiny. Unfortunately, there has been relatively little litigation in Hawaii on Sunshine Law
matters, so many of the legal questions remain unresolved. Despite uncertainty about the ultimate legal worth of these opinions, however, they remain relatively useful statements of agency policies.

Second, some early opinions might have been superceded by changes in the law. Although the law relating to public records has been relatively unchanged since the Territorial days, provisions relating to public meetings were substantially amended in 1975, 1984, and 1985. Where possible, I have noted the impact of major legal changes, but a major reanalysis of prior opinions has not been attempted.

These opinions should, therefore, be treated as starting points for understanding public policy rather than as definitive statements of law. When the opinions favor openness, they can be relied on to provide authority for continued disclosure. However, opinions which favor secrecy often give way to well-presented and persistent arguments for openness, and should therefore not discourage or deter sunshine requests.

The one-line summaries appearing in Part I and the abstracts in Part II emphasize what I felt to be the most important sunshine elements of each opinion. Any errors which may appear are my own responsibility and not that of Common Cause.
COMMON CAUSE

Common Cause is a nonprofit, nonpartisan organization of citizen activists working together for more open, honest, and accountable government. In Hawaii, Common Cause staff and volunteers monitor legislative and executive agencies, lobby for improved ways of doing the public's business, and serve as "watchdogs" against government abuse.

Common Cause/Hawaii was organized in 1973, just three years after the organization was formed as a national citizens' lobby. Today Common Cause has more than 1,400 members in Hawaii and over 250,000 nationwide.

Common Cause/Hawaii has aggressively supported openness in government. In addition to lobbying for stronger sunshine laws, Common Cause has sued the State Legislature three times—in 1980, 1981, and again in 1983—over repeated instances of unnecessary secrecy. Common Cause also maintains background files on sunshine-related issues which are open for public use. For more information, contact the Common Cause office in Honolulu at 533-6996.

Technical Note

This index has been compiled using the programs PFS:File and PFS:Report running on an Apple IIe computer. The file is contained on one 5-1/2", single-sided floppy disk in Apple format. Copies of the data disk are available on request.

Ian Y. Lind
Executive Director, Common Cause/Hawaii
PART I

KEYWORD INDEX
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Attorney General, State of Hawaii</td>
</tr>
<tr>
<td>BOE</td>
<td>Board of Education, State</td>
</tr>
<tr>
<td>CC1/CC3</td>
<td>Circuit Court, 1st/3rd Circuits</td>
</tr>
<tr>
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<td>Dept. of Commerce and Consumer Affairs, State</td>
</tr>
<tr>
<td>HawCC</td>
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</tr>
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</tr>
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<td>Neighborhood Commission, Honolulu</td>
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PAGE 3
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<th>SOURCE</th>
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<td>Meeting to discuss labor negotiations must be open</td>
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<td>Meeting of Council members-elect not public</td>
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<td>County Council does not have to make tape or transcript of meetings</td>
<td>MCC</td>
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<td>79/08/27</td>
<td>Proper notice necessary for Council decision</td>
<td>HonCC</td>
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<tr>
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<td>80/05/23</td>
<td>A county council standing committee is governed by Sunshine Law</td>
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<tr>
<td></td>
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<td>Sunshine violations not ethics matter</td>
<td>HonEC</td>
</tr>
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<td></td>
<td>80/07/10</td>
<td>Public notice must be given of meeting recessed to unspecified date</td>
<td>MCC</td>
</tr>
<tr>
<td></td>
<td>81/01/02</td>
<td>Proper notice of meeting does not require access to documents</td>
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</tr>
<tr>
<td></td>
<td>83/01/20</td>
<td>Meeting to consult nonlegal staff must be open</td>
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<td></td>
<td>83/12/01</td>
<td>Proposed amendment would allow counties to supercede Sunshine Law</td>
<td>MCC</td>
</tr>
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<td></td>
<td>84/03/08</td>
<td>A meeting qualifies for Ch.32 treatment when convened.</td>
<td>DCS</td>
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<td>84/07/25</td>
<td>Limits on additions to published agenda reviewed</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>85/06/29</td>
<td>Public testimony can be restricted to committee meetings</td>
<td>MCC</td>
</tr>
<tr>
<td></td>
<td>85/09/27</td>
<td>Informational meeting not subject to Sunshine Law</td>
<td>MCC</td>
</tr>
<tr>
<td></td>
<td>85/10/09</td>
<td>Informal meetings cannot relate to official business</td>
<td>MCC</td>
</tr>
<tr>
<td></td>
<td>85/10/15</td>
<td>Public testimony provision applies to County Council meetings</td>
<td>HawCC</td>
</tr>
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<td></td>
<td>86/01/21</td>
<td>Each &quot;reading&quot; before Council must occur at separate meeting</td>
<td>HawCC</td>
</tr>
<tr>
<td></td>
<td>86/02/10</td>
<td>Amended Sunshine Law requires opportunity to testify</td>
<td>AG</td>
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<td>76/00/00</td>
<td>State government directory available w/o written request</td>
<td>OMB</td>
</tr>
<tr>
<td>DCCA</td>
<td>84/12/18</td>
<td>Names of persons licensed by DCCA are matter of public record</td>
<td>AG</td>
</tr>
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<td>83/08/05</td>
<td>Advisory committee on pesticides exempt from Sunshine Law</td>
<td>1CC</td>
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<td>Directory</td>
<td>76/00/00</td>
<td>State government directory available w/o written request</td>
<td>OMB</td>
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<tr>
<td>DLNR</td>
<td>76/00/00</td>
<td>Monthly catch reports are public records</td>
<td>OMB</td>
</tr>
<tr>
<td>Doctors</td>
<td>80/00/00</td>
<td>Names and Medicaid income of doctors public</td>
<td>OMB</td>
</tr>
<tr>
<td>Documents</td>
<td>53/00/00</td>
<td>Letters are public records when filed</td>
<td>HonCC</td>
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<tr>
<td>DPED</td>
<td>79/02/05</td>
<td>Information on status of loans is confidential</td>
<td>AG</td>
</tr>
<tr>
<td>Education</td>
<td>78/00/00</td>
<td>Annual report of private vocational school open</td>
<td>OMB</td>
</tr>
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<td></td>
<td>85/09/06</td>
<td>ASUH held not subject to Sunshine Law</td>
<td>AG</td>
</tr>
<tr>
<td>Education.Dept</td>
<td>77/07/08</td>
<td>Certain DOE licensing records confidential</td>
<td>AG</td>
</tr>
<tr>
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<td>78/00/00</td>
<td>Annual report of private vocational school open</td>
<td>OMB</td>
</tr>
<tr>
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<td>77/00/00</td>
<td>Voter information public when filed with Clerk</td>
<td>OMB</td>
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<td>65/00/00</td>
<td>Employee address &amp; phone number not public</td>
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# HAWAII SUNSHINE LAW OPINIONS

<table>
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<th>SOURCE</th>
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<td>80/05/25</td>
<td>Sunshine violations not ethics matter</td>
<td>UH</td>
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<td>Ethics</td>
<td>71/00/00</td>
<td>Prohibition on disclosure of information held unconstitutional</td>
<td>CC3</td>
</tr>
<tr>
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<td>78/02/14</td>
<td>Ethics violators cannot be publicly named</td>
<td>HonEC</td>
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<td>80/05/25</td>
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<td>76/08/10</td>
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<td>Adjudicatory functions of Civil Service Commission exempt from sunshine</td>
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<td>83/12/01</td>
<td>Proposed amendment would allow counties to supersede Sunshine Law</td>
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<td>83/12/08</td>
<td>Transcript of fact finding hearings not public</td>
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<td>82/00/00</td>
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<td>Findings of Labor Department investigation should be public</td>
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<td>Monthly catch reports are public records</td>
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<td>75/07/09</td>
<td>Guidelines for implementation of Sunshine Law</td>
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<td>85/02/13</td>
<td>Updated Sunshine Law guidelines for City agencies</td>
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<td>85/01/21</td>
<td>List of persons with gun permits confidential</td>
<td>HPD</td>
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<td>84/05/24</td>
<td>Issue of &quot;hand-carried&quot; additions to agenda reviewed</td>
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PAGE 5
<table>
<thead>
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<th>SOURCE</th>
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- HonCC
- UMB
- Senate
- OMB
- MCC
- AG
- OCS
- AG
- HawCC
- MCC
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## Hawaii Sunshine Law Opinions

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PAGE 11
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<td>Public testimony provision applies to County Council meetings</td>
<td>HawCC</td>
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<td></td>
<td>86/01/21</td>
<td>Each &quot;reading&quot; before Council must occur at separate meeting</td>
<td>HawCC</td>
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<td></td>
<td>86/02/10</td>
<td>Amended Sunshine Law requires opportunity to testify</td>
<td>AG</td>
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<tr>
<td>Trade.Secrets</td>
<td>78/06/06</td>
<td>Monthly catch reports are public records</td>
<td>OMB</td>
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<td></td>
<td>84/04/12</td>
<td>Proposals are public records unless containing exempt data</td>
<td>HonCC</td>
</tr>
<tr>
<td>Traffic.Records</td>
<td>61/04/04</td>
<td>Police records generally closed</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>79/05/22</td>
<td>Motor vehicle registration data not public</td>
<td>AG</td>
</tr>
<tr>
<td></td>
<td>79/10/26</td>
<td>Auto registration info not public record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Transportation.Dept</td>
<td>82/06/06</td>
<td>Bid information confidential until opening</td>
<td>OMB</td>
</tr>
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<td>Cost of copies must be &quot;reasonable&quot;</td>
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<td>Unclaimed.Property</td>
<td>78/12/14</td>
<td>Unclaimed property records are public records</td>
<td>AG</td>
</tr>
<tr>
<td>University</td>
<td>79/07/24</td>
<td>Sunshine Law applies to orientation session of Board Regents</td>
<td>Senate</td>
</tr>
<tr>
<td></td>
<td>01/12/07</td>
<td>ASUH and other student organizations not subject to sunshine</td>
<td>Au</td>
</tr>
<tr>
<td></td>
<td>02/03/16</td>
<td>UH appointment not violation of sunshine</td>
<td>AG</td>
</tr>
<tr>
<td></td>
<td>02/05/24</td>
<td>Names of University job applicants private</td>
<td>UH</td>
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<td></td>
<td>84/01/11</td>
<td>UH Regents cannot publish salaries of University employees</td>
<td>AG</td>
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<tr>
<td></td>
<td>84/03/12</td>
<td>Salaries and periods of appointment considered confidential</td>
<td>UH</td>
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<td></td>
<td>85/08/06</td>
<td>ASUH held not subject to Sunshine Law</td>
<td>AG</td>
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<td>KEYWORD</td>
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<td>Violations</td>
<td>83/11/27</td>
<td>Committees of UH Board of Regents must comply with Sunshine Law</td>
<td>AG</td>
</tr>
<tr>
<td>Vital.Records</td>
<td>80/05/25</td>
<td>Sunshine violations not ethics matter</td>
<td>HonEC</td>
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<tr>
<td>Voidability</td>
<td>77/00/00</td>
<td>Vital records available for research</td>
<td>OMB</td>
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<tr>
<td>Voter.Registration</td>
<td>77/12/30</td>
<td>Sunshine law applies to items arising out of report</td>
<td>HonCC</td>
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<td></td>
<td>82/11/23</td>
<td>Voter information public when filed with Clerk</td>
<td>OMB</td>
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<td></td>
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<td>Challenge to voter registration not public</td>
<td>HonCC</td>
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<tr>
<td>Water</td>
<td>76/06/25</td>
<td>Board of water Supply records subject to disclosure under Sunshine Law</td>
<td>MCC</td>
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<td></td>
<td>63/03/01</td>
<td>Water consumption data are not public</td>
<td>HonCC</td>
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<td>83/06/05</td>
<td>Advisory committee on pesticides exempt from Sunshine Law</td>
<td>1CC</td>
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<td>Worksheets</td>
<td>83/04/04</td>
<td>Legislature's detailed budget worksheets not public records</td>
<td>CC1</td>
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<td>written.Request</td>
<td>75/00/00</td>
<td>Rules available without written request</td>
<td>OMD</td>
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<td></td>
<td>76/00/00</td>
<td>State government directory available w/o written request</td>
<td>OMB</td>
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PART II

CHRONOLOGICAL LISTING OF ABSTRACTS
<table>
<thead>
<tr>
<th>YR/MON/DAY</th>
<th>SOURCE</th>
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<tbody>
<tr>
<td>46/00/00</td>
<td>Honolulu Corporation Counsel Op. 46-18/68</td>
<td>Records of the Liquor Commission, including information furnished by applicants for liquor licenses, are public records and open for inspection.</td>
</tr>
<tr>
<td>53/00/00</td>
<td>Honolulu Corporation Counsel Op. 53-44</td>
<td>Letters or documents received by the Clerk's office written by private citizens are not subject to public inspection until ordered &quot;filed for record&quot;, i.e. delivered to proper officer with the purpose or intention that it become part of the official record. However, letters and documents written by public officials in their official capacity are subject to public inspection, prior to any Council meeting, when received by the City Clerk.</td>
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<tr>
<td>58/00/00</td>
<td>Honolulu Corporation Counsel Op. 58-2</td>
<td>Performance ratings of City and County civil service employees made by department heads and submitted to the Civil Service Department pursuant to statutory mandate are public records and are therefore open to public inspection.</td>
</tr>
<tr>
<td></td>
<td>Honolulu Corporation Counsel Op. 58-98</td>
<td>Eligible lists and examination record cards which are made and kept by the Civil Service Commission under authority of law are public records open to inspection by any citizen at any time during business hours.</td>
</tr>
<tr>
<td>61/00/00</td>
<td>Honolulu Corporation Counsel Op. 61-25</td>
<td>Autopsy reports prepared by the Medical Examiner are public records which are open to the public.</td>
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<tr>
<td></td>
<td>Honolulu Corporation Counsel Op. 61-52</td>
<td>Records of the Honolulu Police Department, except records of traffic accidents under certain conditions, are not subject to public inspection unless permission is granted by the Chief of Police or the Prosecuting Attorney.</td>
</tr>
<tr>
<td>65/00/00</td>
<td>Honolulu Corporation Counsel Op. 65-63</td>
<td>Where employees of the Division of Refuse are administratively required to file current addresses and telephone numbers with the Division and such filing is not required by statute or regulation, the information furnished are not public records and are not open to public inspection.</td>
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<td>70/00/00</td>
<td>Ombudsman Opinion 70-708</td>
<td>The Ombudsman was asked to determine whether the payroll affidavits submitted to a contracting agency are public records. It was determined that release of payroll affidavits would invade the privacy of individuals involved and, therefore, the affidavits are not public records. However, it was noted that any person may file a complaint about alleged nonpayment of prevailing or required wages and that the Department of Labor will investigate.</td>
</tr>
<tr>
<td>71/00/00</td>
<td>3rd Circuit Court, C.A. No. 2366</td>
<td>The Big Island Press Club went to court to challenge a county ordinance which allowed proceedings of the Board of Ethics to take place in meetings closed to the public. The Court ruled that Board deliberations could be closed only after a finding that &quot;the subject does involve personal matters affecting the privacy of an individual.&quot; In addition, based on a lengthy analysis of the public's right to know, the Court invalidated two provisions requiring that information about ethics violations be kept confidential. The Court held that these provisions were overly broad and violated the first amendment. Big Island Press Club, et. al., vs. Board of Ethics of the County of Hawaii.</td>
</tr>
<tr>
<td>71/00/00</td>
<td>Ombudsman Opinion 71-313</td>
<td>A member of a citizen action organization requested permission to duplicate tape-recorded minutes of a public hearing by the Board of Land and Natural Resources, but was told that a good or valid reason was necessary. The Ombudsman pointed to the Sunshine Law and the City Charter, which provide for public access to documents and records. The Ombudsman &quot;expressed our opinion that it appeared unwarranted to require a member of the public to have to justify access to or a request for public records. The complainant was subsequently allowed to duplicate the tape.</td>
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<tr>
<td>72/00/00</td>
<td>Ombudsman Opinion 72-967</td>
<td>A former patient of the Hawaii State Hospital complained that she had been denied access to her State Hospital or mental health records. The law defined such records as confidential, but subject to disclosure to a patient's</td>
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<td>72/01/26</td>
<td>Maui Corporation Counsel Opinion</td>
<td>The Maui Corporation Counsel advised the mayor that all records of the county, except those that would invade the personal privacy of any individual, should be considered public records and made available upon request.</td>
</tr>
<tr>
<td>72/09/11</td>
<td>Honolulu Corporation Counsel Op. M72-68</td>
<td>Information from City payroll records, including exact gross pay, deductions, garnishments, etc., held to be confidential. Other information, such as employee title, grade level, salary range and total amount of City payroll is public.</td>
</tr>
<tr>
<td>73/04/04</td>
<td>Honolulu Corporation Counsel Op. SR73-4</td>
<td>Plans and other materials submitted as part of a building permit application remain the private property of the applicant and do not become public records until the permit is issued.</td>
</tr>
<tr>
<td>74/00/00</td>
<td>Ombudsman Opinion 74-1498</td>
<td>The victim of a crime asked to examine the report of the police investigation of the crime. The police denied access to the report on the basis of a City Charter provision that &quot;records of the police department or of the prosecuting attorney...&quot; are not open for inspection without the permission of the Chief of Police or prosecutor. The Ombudsman agreed that the police have the discretion to release or to withhold such information.</td>
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<td>Ombudsman Opinion 74-365</td>
<td>A local organization requested access to a list of residents of the state prison, but the Corrections Division maintained that the list was not public information. After review by attorney general, the Corrections Division was advised that a list of residents at the Prison would appear to be a matter of public record and the prison should not keep</td>
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HAWAII SUNSHINE LAW OPINIONS

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<tr>
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<tr>
<td>75/00/00</td>
<td>Ombudsman Opinion 75-1515</td>
<td>A person complained that the Board of Paroles and Pardons required her to submit a written request and to state reasons in order to get a copy of the Board's rules and regulations. After discussion with the Board and the attorney general, it was found that the Board could not require a written request nor a statement of reasons for wanting a copy of the rules.</td>
</tr>
<tr>
<td>75/06/19</td>
<td>Hawaii County Corporation Counsel Opinion</td>
<td>After the original passage of the Sunshine Law, the Civil Service Commission of Hawaii County asked how the new law would affect their meetings. The Corporation Counsel advised that because the law exempts &quot;quasi-judicial&quot; functions of boards, the hearings of the Commission would not be subject to the Sunshine Law. However, rule-making or other business meetings would have to comply with the open meeting provisions of the law.</td>
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<tr>
<td>75/07/09</td>
<td>Attorney General Memorandum</td>
<td>After the Sunshine Law was passed by the Legislature, the Attorney General prepared guidelines &quot;to inform governmental bodies involved...&quot; Most of the advice relates to the basic requirements for open meetings. The memo advises that only regular working or business days should be counted towards the required advance notice period. People can request notice of meetings by mail, and such notices have to be mailed no later than the time the notice is officially filed. Other provisions relating to exemptions, minutes, and sanctions are also reviewed.</td>
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| 75/07/11   | Honolulu Corporation Counsel Memorandum | In a memo sent to "all departments, boards, and commissions" of the City and County of Honolulu, Deputy Corporation Counsel William Kahane reviewed the provisions of the Sunshine Law passed by the 1975 state legislature. The memo offers general guidelines for implementation of the open meeting and public records provisions. In general, every meeting of a board, "defined as any temporary or permanent agency, authority, board, commission, or committee of the City" is covered by the law "if that board requires a quorum to conduct official business." The memo notes that the intent of the law is to protect "[t]he public's right to know when board meetings are held, the right to attend such
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<tr>
<td>75/07/25</td>
<td>Attorney General Op. 75-7</td>
<td>Based on interpretation of the legislative history of the sunshine law, applications for motion picture operator's licenses under Chapter 440E HRS held not to be public records and not subject to inspection. Public disclosure held to violate privacy of individual.</td>
</tr>
<tr>
<td>75/08/27</td>
<td>Honolulu Corporation Counsel Op. M75-93</td>
<td>A general notice of a Planning Commission hearing was held to be adequate. A more specific notice identifying each parcel affected held to be unnecessary.</td>
</tr>
<tr>
<td>75/09/30</td>
<td>Attorney General Op. 75-11</td>
<td>The Board of Education requested an opinion as to whether they were permitted to hold a meeting, closed to the public, to develop employment criteria to be used in reviewing applicants for the job of Superintendent of Education. The Attorney General found that the Sunshine Law does not contain any exemption for such meetings. A closed executive meeting can be held to consider the hire, evaluation, dismissal or discipline of a specific individual, but this does not allow general discussions to be closed.</td>
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<tr>
<td>75/10/17</td>
<td>Attorney General Letter</td>
<td>The Attorney General held that the Governor's cabinet meetings are not subject to the open meeting requirements of the Sunshine Law. The cabinet is not an agency covered by sunshine. In a separate section, the opinion also held that there is no time limit on the retention of meeting notices filed in the office of the Lt. Governor or county clerks. The AG advised that notices should be kept &quot;for a reasonable time&quot;, but also said that it is assumed &quot;that the specific board involved would retain the notice together with the minutes of the scheduled meeting in its files, and thus, it would always be available....&quot;</td>
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Before ejecting "disorderly" persons from a City Council hearing, the Council must observe the usual parliamentary procedures including a motion and vote. If a potential "riot" situation exists, summary action can be taken without the benefit of a motion, second, or vote.

A complaint was received against the Department of Agriculture for failing to provide sufficient notice prior to a public hearing held to discuss proposed amendments to its rules and regulations. It was determined that less than the required 20 days notice was provided and, therefore, the Attorney General "advised the Department to issue new public notices and hold another public hearing to obtain additional testimony."

The Department of Accounting and General Services (DAGS) required a written request and reasons in order to obtain a copy of the State Government Telephone Directory. After consultation with the Ombudsman, DAGS "was uncertain whether the directory could be considered a public document". However, effective immediately, DAGS agreed to sell the directory to the general public, as long as copies are available, without requiring a written request.

The Attorney General held that records from investigations of the Department of Occupational Safety and Health are not public records. The legislative history of relevant laws shows that such records were meant to remain confidential. Disclosure of information relating to the identification of witnesses and information and statements given by them in an accident investigation cannot be released to the public. Other information such as recommended safety measures can be released. Nothing prevents anyone from seeking information directly from witnesses to an industrial accident.

A UH researcher requested access to computer tapes containing Ambulance Statistical Reports from the Emergency
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<td>76/05/28</td>
<td>Honolulu Mayor's Directive No. 199</td>
<td>Following passage of the Sunshine Law in 1975, the Honolulu Corporation Counsel circulated a memorandum containing guidelines for application of the new law. &quot;It shall be the policy of this Administration to be guided by the intent of the law and if we are to err, we shall err on the side of fullest disclosure,&quot; the memo states. The memo goes on to review the basic provisions of the original Sunshine Law.</td>
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<tr>
<td>76/06/25</td>
<td>Maui Corporation Counsel Opinion</td>
<td>The director of the Maui County Board of Water Supply asked whether Board records are considered &quot;public records&quot; subject to the Sunshine Law. The Corporation Counsel responded that the Board of Water Supply is a board as defined by the Sunshine Law, and that all records &quot;which do not invade the right of privacy of any individual&quot; must be available for public inspection.</td>
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<tr>
<td>76/08/10</td>
<td>Honolulu Corporation Counsel Op. M76-78</td>
<td>The City Council initiated a special investigation of the Kukui Plaza case to be conducted by its Special Committee of the Whole. The Council asked whether the investigation would be subject to the Sunshine Law. It was held that the entire investigation would be subject to the open meeting requirements of sunshine and that all meetings would therefore have to be open to the public. It was also concluded that &quot;there is no basis for any argument that the City Council is somehow in a more privileged position than an administrative board or commission&quot; with regard to Sunshine Law requirements.</td>
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<tr>
<td>76/08/11</td>
<td>Honolulu Corporation Counsel Op. M76-81</td>
<td>Meetings between the Civil Service Commission and the</td>
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### ABSTRACT

Commission staff to discuss the process used to evaluate police officers for promotion must be open to the public. The Civil Service Commission is a "board" as defined by the Sunshine Law, and its meetings must generally be open. If the meeting is for the evaluation of a specific person, then the meeting could be closed.

The Corporation Counsel held that the Promotion Potential Review Panel, which recommends promotion of Honolulu Police officers, is not subject to provisions of the Sunshine Law as amended in 1976. The Panel, according to this opinion, was not created "by constitution, statute, rule, or executive order". Therefore, the Panel is not a "board" for purposes of sunshine.

A Hawaii County Council subcommittee on collective bargaining met in executive session to hear testimony concerning the progress of negotiations with public employee unions. The closed meeting was challenged by reporters and others, and the Council asked the Court to approve the executive session. The Court found that although the meeting seemed to fall under certain provisions of the state Sunshine Law and of the County Charter, "the provision which is most strongly supportive of openness" would prevail. In this case, it was held that the County Charter would allow closed meetings to meet with the county attorney regarding "pending or imminent litigation, or pending contested cases in administrative proceedings...." However, a closed meeting to discuss collective bargaining is a violation of the charter. County of Hawaii vs. David Shapiro, et. al.

Someone complained that soon after registering to vote, he had received literature from a campaign committee. He questioned how the information was obtained. The City Clerk advised that the general county register, which is the list of registered voters, is considered public information. Information gathered by voter registrars is considered public information when it is entered and the voter is registered in the general county register.
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<tr>
<td>77/07/06</td>
<td>Attorney General Memorandum</td>
<td>A researcher living on a neighbor island requested access to birth, death, and marriage records for research purposes. The request was turned down by a neighbor island District Health Office because permission of the Director of Health is necessary for release of such records. It was determined that due to &quot;stringent statutory provisions&quot;, birth records were accessible only in Honolulu. However, death and marriage records could be made available for purposes of research provided that the researcher complied with certain conditions to protect the confidentiality of the records.</td>
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<td>77/11/30</td>
<td>Honolulu Corporation Counsel Op. M77-112</td>
<td>In a memorandum addressed to Charles G. Clark, superintendent of schools, the Attorney General states that licensing forms handled by the DOE are not public records because of their potential of invading the right of privacy of an individual. Reference is made to House Judiciary Committee Report 594 on S.B. 30 (1959), which was enacted into law as Act 43 (1959). The committee report mentions license applications and welfare records among those meant to remain confidential. However, cease and desist letters written by the DOE as part of their regulatory functions are considered public records which do not invade any right of privacy. Memorandum prepared by Robin K. Campaniano, Deputy Attorney General.</td>
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<tr>
<td>78/06/06</td>
<td>Ombudsman Opinion 78-1550</td>
<td>Certain records kept by the Liquor Commission are public records and subject to public inspection. These include minutes of Commission meetings, and the following documents accompanying license applications: Tax clearance, partnership agreements, certificate of incorporation, map of premises, names of neighboring property owners. Employee registration records and gross sales reports are confidential. Correspondence and intra-office memos may be public, depending on their &quot;contents and purpose&quot;.</td>
</tr>
<tr>
<td>78/06/06</td>
<td>Ombudsman Opinion 78-1550</td>
<td>A person complained that he was denied access by the Department of Education to the annual report submitted by a private vocational school. After review, it was determined</td>
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that the annual reports are required by law and that they are public records which should be available for inspection.

A fisherman was denied access to data from the monthly catch reports submitted to the Department of Land and Natural Resources by commercial fishermen. After review, the Attorney General held that "there is no question that the reports are public records...." In addition, the AG said that "we do not see any problem in releasing of harvest data by island." However, it was also held that "information revealing the bait and fishing grounds" are trade secrets and could not be disclosed.

A State-run hospital took the position that in order to examine one's own medical records, a doctor would have to be present and copies of the records would have to be purchased. Following intervention by the Ombudsman, the hospital administrator agreed that a person can see their own records "unless, in the opinion of the health care provider, it would be detrimental to the health of the patient." It was also determined that it is not necessary to purchase copies of the records in order to inspect them.

No express or implied language was found in relevant provisions of the City Charter to permit the City Ethics Commission to release the names of Board of Water Supply employees found to be in violation of ethics guidelines. The Corporation Counsel recommended an ordinance to allow such public disclosure.

The Neighborhood Boards are boards of the City and County of Honolulu which have been created pursuant to the City Charter to have advisory powers over certain matters. All of the Sunshine Law, Chapter 92 HRS, applies to the Boards. The requirements of Chapter 92 will be superseded only in the event that more stringent requirements for open meetings are created by the county.

Any person desiring to see the record books of an auctioneer may inspect them during regular business hours. The records must include an inventory of items offered for sale in each public auction. The director of Finance has no authority to grant or deny any person the right to inspect auctioneer's records.
In a memorandum addressed to John Farias, Jr., chairman of the Board of Agriculture, the Attorney General held that while each request to inspect animal records must be considered individually, "our general conclusion is that the animal records are not confidential and disclosure should be made unless specific exemptions are met." The memo contains a lengthy discussion of various definitions and types of privacy, and reviews certain court cases involving privacy rights. The memo states that in determining whether privacy rights are involved, "It is not necessary that public inspection of the record be a libelous act in order to establish that protection of a person's character or reputation is deemed necessary." The memo concludes that a notice be included on the quarantine station forms stating that the information provided might be subject to disclosure. The memo was prepared by Leo B. Young, Dep. Attorney General.

In a memorandum addressed to Wayne J. Yamasaki, deputy director of the State Department of Personnel Services, the Attorney General states that the general policy is that information in an employee's personnel file is not released except when subpoenaed or when authorized by the employee. The memo refers to federal case law under the Freedom of Information Act for guidance in determining when release of such information would constitute an invasion of personal privacy. According to the Attorney General, information contained in the personnel file should not be released to a person outside the agency. The memo is signed by Valri Lei Kunimoto and reviewed by Ronald Y. Hanimiya.

Seven Democratic members elected to the Honolulu City Council in 1978 met "informally" to consider leadership and committee assignments. The meeting was held six weeks before the newly elected members were to be sworn in. The Corporation Counsel held that "the individuals who were in attendance at the informal assemblage can close their meeting to the public as well as the media because it was not a meeting of a duly constituted council and therefore not subject to...the State Sunshine Law."

In a memo addressed to Eileen R. Anderson, director of the State Department of Budget and Finance, the Attorney General states: "It is clear that the written reports of abandoned property are required to be filed with the director of finance annually. We do not feel these reports invade the right of
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<tr>
<td>1979/01/00</td>
<td>1st Circuit Court, SP 4997; 79 MLR 79-9543</td>
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<tr>
<td>1979/02/05</td>
<td>Attorney General Memorandum</td>
</tr>
<tr>
<td>1979/02/20</td>
<td>Maui Corporation Counsel Opinion</td>
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<tr>
<td>1979/02/27</td>
<td>Attorney General Memorandum</td>
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**HAWAII SUNSHINE LAW OPINIONS**

**ABSTRACT**

Privacy of any individual. Accordingly, the reports are public records. The memorandum is signed by Corinne K.A. Watanabe, Deputy Attorney General, and Ronald Y. Amemiya.

The Honolulu Advertiser brought suit against the State Department of Health to gain access to records about the Mililani Sewage Treatment Plant and related pollution problems. The court held that the requested records had to be released. Further, the court held that "the State of Hawaii has no discretion to withhold the requested records contained in its files from the public unless the records requested are specifically exempted from public inspection by constitution, statute, properly enacted regulation, or court rule." Honolulu Advertiser vs. George Yuen, Director of the Department of Health, and the State of Hawaii.

In a legal memorandum addressed to Hideto Kono, director of the Department of Planning and Economic Development, the Attorney General states that data concerning "loans, including borrowers' names, amounts, and status of repayment" are confidential. The memo finds that the reports "are prepared only for the purpose of internal management of the accounts," and that no entries are required to be made by law. In addition, the Attorney General finds that certain information, including "identifying information (the loan numbers, the names of borrowers, and the dates of the loans), the amounts and balances, and the status of repayment (whether current or delinquent)" may invade the right of privacy of individuals "since the status of repayment without further explanation of the circumstances...may unfairly and adversely affect the reputation of the borrowers." Memo prepared by Maurice S. Kato, Deputy Attorney General.

The Corporation Counsel advised that the Sunshine Law (Chapter 92 HRS) does not require a board to make tape recordings or transcripts of its meetings. However, if a tape recording or transcript is made, it would become a public record subject to the statute.

In a memorandum addressed to John Farias, chairman of the state board...
of Agriculture, the Attorney General advises that information on the status of
loans made by the Kauai Task Force is confidential. The memo holds that
information on individual delinquent accounts is specifically exempt from public
disclosure under the federal Freedom of Information Act and, therefore, should
not be released by the state. The Attorney General states that
written consent of individual borrowers would have to be obtained before further data could be
released. The memo was prepared by Leo B. Young, Deputy Attorney General.

In response to an inquiry from the Office of the
Ombudsman, the Attorney General wrote an informal opinion
about information regarding the previous legal and
registered owner of a vehicle. The AG held that such
information is not a public record and is not available
for inspection. Release of registration information could
result in an invasion of the privacy of the owner of a
given vehicle and, therefore, its release is not required
by the Sunshine Law.

In response to a request from Senator Neil Abercrombie, the Senate
Majority Attorney issued an opinion which held that an orientation session for
three new members of the UH Board of Regents should have been open to the
public. "The Legislature did not intend to limit public access only to
decision-making meetings," the Senate Majority Attorney wrote to Abercrombie.
The Senator had been excluded from a meeting held on July 23. See report

The Corporation Counsel advised the City Council
that it should not adopt a bill on third reading because
it was not properly placed on the agenda for the meeting.
In order to be properly adopted, the Sunshine Law
requirement for 72-hour advance notice must be met by
the Council. The Corporation Counsel also held that
the item could not be added to the agenda because
it involved broad issues which could affect the public
as a whole. [The Sunshine Law was amended in 1984 to require
notice of meetings to be posted 6 days prior to the scheduled meeting time.

A company involved in mailing services requested information on all new owners of cars and trucks, including names and address of registered and legal owners. The company intended to use such information to develop mailing lists. Such information was held to be exempt from release under the Sunshine Law because its release would violate other statutes.

The City Building Department refused to allow public access to building permit applications, and "all plans, specifications and other documentation submitted" with them, related to a new condominium proposed at Kaola Way and Pacific Heights Road. A suit was filed seeking access to these records. Judge Arthur Fong ordered the Building Department to make all of the documents available without delay. Pauoa-Pacific Heights Community Group, et. al, vs. Building Department, City and County of Honolulu.

A suit was brought by Common Cause/Hawaii seeking a copy of a Senate committee report on HB 1875, which had been killed in the housing committee. Members of Common Cause and the Uahu Tenants Coalition wanted to find out how committee members voted on the bill. They also hoped that the committee report would provide some information about the reasons for the vote. After the suit was filed, members of the committee disclosed how they had voted on the measure, and the Court then dismissed the case. The Senate subsequently amended its rules to clearly establish that such committee reports are public records. Kathleen Bryan, et. al., vs. Richard Wong, et. al.

Following publication of a newspaper article listing the names and Medicaid incomes of doctors who earned the most money through the program, a complaint was filed alleging that the release of the information violated the privacy of doctors. The Au determined that there was no statute
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<td>80/05/23</td>
<td>Maui Corporation Counsel Opinion</td>
<td>A member of the Honolulu City Council requested an opinion from the county Ethics Commission concerning possible Sunshine Law violations involving a &quot;briefing&quot; held by the Council's Zoning Committee. The Ethics Commission determined that &quot;there are no standards of conduct applicable to officers and employees who are alleged to have violated the provisions of the Sunshine Law.&quot; The Commission further recommended that any requests regarding enforcement be referred to the Prosecutor or the Attorney General.</td>
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<td>80/05/25</td>
<td>Honolulu Ethics Commission letter</td>
<td>The chair of the Maui County Council requested an opinion as to whether minutes of the Council's Finance Committee were minutes as defined by the Sunshine Law. The Corporation Counsel held that a committee of the Council is a &quot;board&quot; as defined by the law and, therefore, &quot;the provisions of that section respecting minutes of a board apply to the minutes of the committee.&quot;</td>
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<td>30/07/10</td>
<td>Maui Corporation Counsel Opinion</td>
<td>The Maui Corporation Counsel held that a meeting recessed to a later date can be treated as a continuation of the same meeting as long as the time of that resumption is specified. &quot;However, if a meeting is adjourned sine die (without day), such an adjournment terminates the meeting. Any resumption of</td>
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### HAWAII SUNSHINE LAW OPINIONS

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| 80/08/27   | Honolulu Corporation Counsel Op. w/Date-44 | Real estate data services requested access to computer tapes controlled by various City agencies, notably the Building Department and the Department of General Planning. The information sought included the street name, street address, tax map key number and zoning status of parcels of land throughout Honolulu. It was held that provisions of the Sunshine Law protecting privacy referred to the privacy of persons, not property. The Corporation Counsel therefore concluded that the information is a public record and available for public inspection, and that duplicate tapes could be made available to the public.
| 81/06/06   | Ombudsman Opinion 81-547 | The Tax Department followed a policy of allowing the public to review general excise tax applications at its offices, but would not furnish copies of these documents. Responding to a complaint, the Attorney General determined that "there is no legal basis to prohibit the furnishing of copies of GET applications," and the Department therefore agreed to make copies available upon request.
| 81/01/02   | Maui Corporation Counsel Opinion | The Corporation Counsel held that nothing in the Sunshine Law requires that supporting documents referred to in an agenda be available to the public prior to the scheduled meeting. The law "requires only that notices of meetings be filed with the County Clerk at least seventy-two hours before a public meeting is held....There is, however, no requirement that the committee reports listed on the agenda themselves also must be filed along with the agenda."
| 81/01/14   | Maui Corporation Counsel Opinion | The Corporation Counsel was asked about the Sunshine Law's requirement that minutes be produced and available within 30 days of a public meeting. It was held that the 30-day requirement was not mandatory, and that...
"Failure to make [minutes] available within the prescribed time would not affect any vested rights or seriously prejudice the interest of anyone." The opinion pointed out that this would not mean that the requirement can be ignored. "If there is not substantial compliance with the requirement, then, in our view, the provisions of Chapter 92, HRS, respecting injunctive and penal sanctions would come into play."

In response to an inquiry from the editor-in-chief of Ka Leo O Hawaii, the student newspaper at the University of Hawaii's Manoa Campus, the Attorney General wrote that "ASUH and other student organizations do not fall within the above definition [of a "board"] and thus are not subject to the requirements imposed by the State Sunshine Law." The AG further stated that these organizations were not created "by constitution, statute, rule, or executive order," and "have not been empowered (e.g. by statute) to take official action on specific matters...."

A suit was brought against the legislature after the executive director of Common Cause/Hawaii was denied entry to a closed meeting of a legislative subcommittee working on the state budget. The court held that the issue was moot because the governor vetoed the budget bill, and the legislature then met in special session to adopt a new budget bill. The Court also noted that both House and Senate rules required open meetings and were therefore consistent with Article III, Section 12 of the State Constitution, and it could not be shown that future violations were likely to occur. Thomas R. Grande vs. Tony T. Kunimura, et. al.

The Department of Health awarded a contract for the printing of its newsletter. The amount involved was under $4,000 and, therefore, formal bidding procedures were not required. However, several companies were asked to submit cost estimates, and an unsuccessful bidder asked the Department to disclose the amount of the successful bid. The Department refused. After consultation with the Ombudsman, the Department agreed to provide the information about the successful bid.
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<td>Ombudsman Opinion 82-67</td>
<td>The Department of Transportation was asked for information about the number of persons intending to bid on a certain contract. In consultation with the Attorney General, it was determined that &quot;the names and the number of persons&quot; submitting bids is confidential &quot;until after the opening of bids....&quot;</td>
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<td>82/03/16</td>
<td>Attorney General letter</td>
<td>An individual complained that a $1 per page fee for copies being charged by the Department of Transportation was excessive. The Ombudsman noted that the Sunshine Law allows charges for &quot;reasonable cost&quot; of such copies. Subsequently the Department reduced its copy fee to 25 cents per page.</td>
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<td>82/05/21</td>
<td>State Board of Education letter</td>
<td>At its meeting of October 16, 1981, the UH Board of regents created a new position of UH vice-president and appointed a person to fill the position. The Sunshine Law Coalition complained that this was done without the 72-hour notice required by the Sunshine Law. The Attorney General held that this appointment would not &quot;affect a significant number of persons&quot; and was primarily a matter of &quot;internal management&quot;. Further, the Attorney General held that since personnel matters can be discussed in closed executive sessions, the placement of this matter on the agenda only for a final vote was not a sunshine violation.</td>
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<td>82/05/24</td>
<td>University of Hawaii letter of 5/24/82</td>
<td>The Sunshine Law Coalition requested a complete list of the persons who had applied for the positions of Superintendent of Education and State Librarian in 1981 and 1982. The Board of Education refused to disclose the names of applicants, holding that the release of this information is prohibited by Chapter 92E, HRS. Even if the applications are public records, the Board held that it could not reveal the names because this would violate the privacy of the persons involved. In response to a request from the Sunshine Law Coalition, the University of Hawaii held that it could not release the names of those persons applying for the position of Chancellor. Release of such information would violate the privacy of the persons involved and would be prohibited by Chapter</td>
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YR/MN/DAY SOURCE ABSTRACT
82/11/23 Honolulu Corporation Counsel Op. HE2-95 42E HRS.
The City was asked to allow public access to written challenges to a voter's registration and to records of an investigation into possible election fraud involving voter registration. It was held that such records are exempt from disclosure. However, it was held that once the City Clerk's investigation of voter irregularities is over, the list of stricken voters would be a public record because "the public's right to know about the voting irregularities outweighs the stricken voters' right to privacy."

83/06/00 1st Circuit Court, Civ. No. 7d030 Television station KHOU went to court after the state Department of Health refused to allow the public and press to attend a meeting of its advisory committee appointed to consider the problem of pesticides in drinking water. The Court held that the committee was purely advisory, had no final decision-making power, and was made up of volunteers. Thus, the committee was "not formed by statute, constitution, rule or executive order" and is not subject to the open meeting provisions of the Sunshine Law. An appeal to the Hawaii Supreme Court was rejected on the grounds that the issue was moot. KHOU-TV, Inc., vs. George Ariyoshi, et al.

1st Circuit Court, S.P. 0126 Six state senators and the director of Common Cause/Hawaii filed suit against the State Senate, asking the court to allow inspection of the line-item "worksheets" used in the deliberations over the state budget. The worksheets are the basic documents used by both House and Senate, and then by the joint "conference committee" which makes final recommendations on the budget. The court refused to open the worksheets to inspection, and held that the documents are merely the internal, preliminary working papers of the committee members and staff. An appeal to the Hawaii Supreme Court was rejected following oral arguments on the grounds that the issue was moot. However, the Senate subsequently changed its procedures to make a copy of the worksheets available for public inspection during meetings of the conference committee on the budget. Abercrombie, et al, vs. The Senate, State of Hawaii.
HAWAII SUNSHINE LAW OPINIONS

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| 83/01/20   | Honolulu Corporation Counsel Letter         | In response to a letter from the Sunshine Law Coalition, the Corporation Council stated that "it is unquestionable that the provisions of Chapters 91 and 92,HRS, are applicable to the activities of the City government...." In addition, the Corp Counsel agreed "that a committee meeting of the City Council in which it consults with its nonlegal staff is not one which may be closed to the public...."
| 83/03/01   | Honolulu Corporation Counsel Op. Mu3-13     | The Campbell Estate requested access to Board of Water Supply water consumption data pertaining to tenants in Campbell Industrial Park. The Estate wanted to analyze the data and utilize the findings in projecting future development of the area. The Corporation Counsel held that water consumption records constitute a "public record", but they cannot be released because they are also "personal records" of tenants and their release would violate the personal privacy of those tenants. A written statement from each tenant would be necessary to authorize release of these records. [This opinion conflicts with later opinion that "personal records" apply only to "natural persons"]
| 83/06/08   | Honolulu Corporation Counsel Op. Mu3-20     | Meetings of the Police Commission to interview applicants for the position of Chief of Police, and to deliberate toward a decision may be closed to the public. Such meetings may be held in "executive session" as allowed by the Sunshine Law. However, the actual official selection of the new police chief must be made at a public, open meeting.
| 83/08/05   | First Circuit Court, Civil No. 78055        | KHON-TV filed suit after reporter Jim McCoy was barred from a meeting of a committee formed to advise the director of the Department of Health on matters related to pesticides in water. Circuit Court Judge Wendell Huwyer ruled that the committee had no "official existence" and was simply a group of "volunteers which the director invited to participate in a study of a problem of pesticides in Oahu's water....it merely is a discussion group which shares..."
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<td>4/30/83</td>
<td>Honolulu Corporation Counsel Op. Mo3-54</td>
<td>The Corporation Counsel held that plans and specifications that accompany applications for building permits are not public records, subject to disclosure, until after the issuance of a building permit. If the disclosure of such plans and specifications prior to the issuance of the permit cannot be obtained voluntarily from the applicant, the recourse should be through application to the circuit court. This opinion sidestepped the decision in an earlier court case which held that similar building plans had to be made public.</td>
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<td>4/3/84</td>
<td>Honolulu Police Department Letter</td>
<td>In response to a citizen's request, the Chief of Police stated that the Honolulu Police Department's Rules and Regulations &quot;is not available for public use. Its contents are intended for employees of the department only.&quot; [Letter from Chief of Police Douglas L. Gibb to Mr. Desmond J. Byrne.]</td>
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<td>4/3/84</td>
<td>Maui Corporation Counsel Opinion</td>
<td>A proposal was made to amend the Sunshine Law to place the county councils on the same level as the State Legislature, and the question was asked as to the extent to which the councils could then exempt themselves from the law. The Corporation Counsel found that the law &quot;does not exempt, exclude or except the Legislature, it only limits the application of the provisions to the extent there exists rules and procedures preceding them.&quot; Under the proposal, the counties would be able to set their own sunshine rules and procedures.</td>
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<td>4/3/84</td>
<td>Honolulu Corporation Counsel Op. Mo3-65</td>
<td>The Office of Human Resources was asked to release a taped transcript of a fact finding hearing involving a complaint alleging discrimination. The transcript was held not to be a public record and, furthermore, it was held that disclosure of this information would violate the privacy of persons involved in the case.</td>
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The executive secretary of the Honolulu Neighborhood Commission, in response to a written request, refused to grant access to a tape recording of a Waikiki Neighborhood Board meeting made by commission staff. Several reasons were cited. "First, any taping of board meetings is purely a personal tool limited to assist our field staff in developing a set of draft minutes.... Secondly, we are unaware of any existing statute or regulation that requires the mandatory tape recording of a public meeting. As a result, no tapes that may be taken of open meetings...are retained by this office as public documents." [Letter to Audrey Fox Anderson from John A. Parish, Jr.]

This opinion spells out the manner in which City agencies are to apply existing rules and regulations regarding public records. State law regarding "personal records" is held to be applicable to all personal records, including those which might also be public records. Other public records can be handled according to the rules and regulations of the Managing Director. Agencies are advised to refer cases where a question exists to the Corporation Counsel.

The Attorney General advised that the University's practice of publishing the name, position title, period of appointment, and salary of individuals appointed by the Board of Regents was contrary to the privacy provisions of Chapter 32E HRS, the Fair Information Practices Act. After reviewing the statute, the Attorney General concluded that "the University is not precluded from disclosing the name and position title of Board of Regents appointees. Their salaries and periods of appointment, however, would not appear to be essential information required by the public and is customarily held to be confidential and therefore should not be made public." [Memo from Deputy Attorney General Edward Yuen to Harold S. Nascimento, University Vice-President for Administration; approved by Attorney General Tony S. Honj. Copy provided to Common Cause/Hawaii by Mr. Nascimento on 5/1/84.]

Following a request from Common Cause, the Attorney General held that contract proposals of the Department of Social Services and Housing are public records and required...
### ABSTRACT

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<td>84/03/03</td>
<td>Office of Council Services Memo</td>
<td>The Office of Council Services prepared a memo concerning certain</td>
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<td>rights of the neighborhood boards. Any meeting called to make a</td>
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<td>decision or deliberate towards a decision is subject to chapter 92.</td>
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<td>Certain requirements of chapter 92 precede the meeting itself,</td>
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<td>including requirements for proper notification. &quot;Consequently, a</td>
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<td>meeting qualifies for Chapter 92 treatment at the time it is</td>
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<td>called, not at the time it actually takes place. This would have</td>
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<td>to be true because one cannot predict beforehand whether a quorum</td>
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<td>will be present at the time the meeting convenes.&quot;</td>
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<td>84/03/12</td>
<td>University of Hawaii Memorandum</td>
<td>In a memo addressed to &quot;All Vice Presidents and Chancellors,&quot;</td>
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<td>University of Hawaii president Fujio Matsuda advised that Chapter</td>
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<td>92E HRS &quot;expressly prohibits the University of Hawaii and its</td>
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<td>personnel from disclosing or discussing personal records....&quot;</td>
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<td>According to Matsuda, &quot;the attorney general's office has advised</td>
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<td>the University to refrain from disclosing any information about</td>
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<td>University personnel other than name and position title. Salaries</td>
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<td>and periods of appointment are considered confidential.&quot;</td>
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<td>84/04/11</td>
<td>Honolulu Corporation Counsel Op. M84-11</td>
<td>A neighborhood board failed to have a quorum for a regularly</td>
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<td>scheduled meeting, and a question was raised as to whether this</td>
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<td>&quot;meeting&quot; was sufficient to meet their obligation, under the</td>
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<td>Neighbor Plan, to hold a certain number of meetings per year. The</td>
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<td>opinion from the Corporation Counsel held that the Sunshine Law</td>
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<td>requires the presence of a quorum in order to conduct official</td>
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<td>business. &quot;Board action taken in violation of Chapter 92, HRS,</td>
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<td>would be null and void.&quot; However, it was also held that for</td>
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<td>purposes of meeting the obligation of holding a meeting, the</td>
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<td>convening of a meeting and issuance of proper notice was</td>
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<td>sufficient, even though it had to</td>
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<td>84/04/11</td>
<td>Honolulu Corporation Counsel Letter</td>
<td>Adjourn immediately due to lack of a quorum. In response to an inquiry by Common Cause, the City Corporation Counsel stated that the rules and regulations of the Honolulu Police Department &quot;are matters of internal management and, by law, are not available for public inspection unless the department chooses to make them so available.&quot; Further, the letter stated that the Chief of Police &quot;has already indicated that these particular documents should not be released.&quot; (Letter from Gary W. Slovin, Corporation Counsel, City and County of Honolulu, to Ian Lind, executive director, Common Cause/Hawaii.)</td>
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<td>84/04/12</td>
<td>Honolulu Corporation Counsel Op. A04-15</td>
<td>Common Cause/Hawaii requested access to proposals submitted to the City Housing Department pursuant to a design/aid competition. An opinion of the Corporation Counsel held that such proposals are public records that are open to inspection unless release of the information would (a) violate personal privacy, (b) reveal trade secrets, or (c) impair present or imminent contract awards. In order to justify withholding, &quot;the burden is on the party to prove that the information is a trade secret&quot;. In addition, the public's interest in disclosure must be balanced against any reasons alleged to justify withholding of records from the public. The opinion appears to require a change in City policy, which in the past routinely denied public access to these proposals.</td>
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<td>84/05/24</td>
<td>Office of Council Services Letter</td>
<td>Cynthia Thielen, attorney with the Office of Council Services, City and County of Honolulu, prepared a lengthy memo on additions to a meeting agenda. The question is reviewed in light of the sunshine law and the relevant sections of the City Charter. The memo also reviews the legislative history of Section 92-7 HRS related to agendas. The memo concludes that &quot;due to the strong State policy for open government, as articulated in the Sunshine Law, it would be prudent for the committees to refrain from adding new agenda items other than of an honorary, initial procedural introduction or referral, informational, or similar nature unless an emergency arose.&quot; It addition, the memo advises that &quot;a hand-carried item relating to a properly noticed agenda matter should be examined to determine whether or not its impact</td>
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**PAGE 40**
changes the agenda item so significantly that it...becomes new subject matter."

A letter from Jane Howell, Deputy Corporation Counsel, to Andrew Chang, city managing director, reviews a legal memo prepared by Cynthia Thielen concerning additions of hand carried items to council meeting agendas. "Other than items such as informal resolutions, introduction or referral for first reading of bills, and submissions for information only, which may be added by two-thirds vote, new matters should not be added to agendas." The Corp Counsel notes that "close calls should be made in light of the legislative declaration of policy...to the effect that 'it is the intent of this part to protect the people's right to know.'" [Memo included as Exhibit B-2 attached to 2/13/85 letter from Richard Wurdeman to Councilmember Marilyn Hornfors].

The Maui County Planning Commission published an agenda for a meeting scheduled for June 26, 1984. Questions were raised about the adequacy of the agenda because it failed to offer an explanation of the relevant items, the specific nature of the Council action was not described accurately, and one parcel of land involved was omitted. The Corporation Counsel, while agreeing that the agenda "leaves a lot to be desired," held that it was adequate "in the context of the entire record" as a notice to the public.

The Professional and Vocational Licensing Division of the State Department of Commerce and Consumer affairs licenses various professionals. A computerized roster is maintained of the name, address, and type of license held by each individual licensee. The AG held that the address and telephone numbers of licensees are personal information and are required to remain confidential by Chapter 652 HRS. However, the names and type of license held by each individual is a matter of public record and should be available.

The Kailua Neighborhood Board (#46) asked whether an item arising out of a board committee or chair report and deferred to new business must be added to the agenda by a two-thirds recorded vote
of all members to which the board is entitled. The Corporation Counsel concluded that the Sunshine Law would apply to such matters and that such a vote would be necessarily to properly put such a matter before the board. In addition, it was noted that it would not have been proper to add the item "if it was of reasonably major importance and action thereon by the board would affect a significant number of persons."

In response to a request from a private citizen, Police Chief Douglas Gibb responded that "Chapter 92E of the Hawaii Revised Statutes limits this department from disclosing or authorizing the disclosure of personal records by any means to any person other than the individual to whom the record pertains." For this reason, lists of persons holding gun permits issued by the Honolulu Police Department are not considered public records by the Police.

The Corporation Counsel interprets Chapter 92E to prevent the public release of the names of police officers against whom a complaint has been filed and sustained by the Police Commission. According to the Corp Counsel, such information would be part of a "personal record", would not fall under any of four specific exemptions, and therefore must remain confidential as a matter of law.

The State Commission on the Status of Women asked whether their meeting agendas could contain general references to "new business" or "unfinished business". The Au held that such matters should be listed "in order to give interested members of the public reasonably fair notice of what the Commission proposes to consider." In addition, the Au noted that the law specifically requires that minutes of meetings must be made available to the public on request, although a reasonable fee may be charged.

In response to a request from Councilmember Marilyn Bornhorst, acting Corporation Counsel Richard Woodman wrote a set of guidelines issued to city agencies regarding proper implementation of the state Sunshine Law. The memo
notes that the provisions of the City Charter or applicable city ordinances apply if they are more stringent than the Sunshine Law. For example, the Act allows closed "executive sessions" under fewer circumstances than state law. The guidelines cover requirements for advanced written notice of meetings, written minutes, the public's right to tape record a meeting, and the penalties for willful violation of the law. [The guidelines refer to a 72-hour advance notice requirement. This is an error. The law was amended in 1984 to require 6 days notice.]

The Corporation Counsel advised the Police Commission that while the Sunshine Law was amended in 1985 to require that people be given an opportunity to present oral testimony in any meeting, it does not require that the Commission formally adopt a rule to that effect. It is sufficient that the practice of the Commission is to accept oral testimony. The opinion also reviews other changes in the law regarding executive sessions and enforcement actions.

The Corporation Counsel held that Act 270 (1985) allows the council to limit oral testimony to the committee level if rules to that effect are properly adopted. The opinion is based on the view that Act 270 requires "an opportunity to present oral testimony" and does not require multiple opportunities. Similarly, the Corporation Counsel found that time limits could be established by rule. [This opinion contradicted by later opinion of the Attorney General.]

In response to an inquiry, the Attorney General held that ASUH is not a board that has been created by constitution, statute, rule, or executive order. "Furthermore, the ASUH is not empowered to take official actions on behalf of the State or its political subdivisions." A Georgia state decision is cited which holds an advisory committee exempt from Sunshine (a decision which may not be applicable due to differences between Georgia and Hawaii law). Note: A lengthy Common Cause memo responding to this opinion is available.

In response to a question raised by a member of the County Council,
the Corporation Counsel found that "all county boards and commissions allow for public testimony on agenda items of its public meetings, although none expressly restricts the taking of such testimony by rule." It was noted, however, that the law allows for the imposition of reasonable rules such as limits on time allowed for oral testimony.

The Maui Corporation Counsel held that an "informational meeting" between the Planning and Land Use Committee of the Maui County Council and members of the Kihei-Makena Citizens Advisory Committee did not violate the Sunshine Law, Chapter 92 HRS. The opinion concluded that because the meeting would not appear to involve either making a decision or deliberating towards a decision, it was not a "meeting" as defined by the Sunshine Law. The rules of the Council would govern its conduct.

Maui County Council member Wayne Nishiki asked for an opinion as to whether informal meetings scheduled by the Council chair or a committee chair and held without an agenda or minutes would be a violation of the Sunshine Law, Chapter 92 HRS. The Corporation Counsel responded that the law allows such informal meetings when "matters relating to official business are not discussed." No opinion was offered on the legality of a specific meeting held on September 12, 1985 because insufficient information was available as to whether official business was discussed or not.

In response to a question from Council member Takashi Domingo, the Corporation Counsel held that "open meeting requirements, which includes the taking of both oral and written testimony from the public, attaches to each public meeting independently, be it a council meeting, or a committee meeting. The proper focus of the legislative mandate set out in Act 270 is the public's right to participate in every public meeting by testifying on agenda items." The legislative history of the 1985 amendments to the Sunshine Law is reviewed. The Corporation Counsel thus advised that a proposed rule to limit public testimony to committee meetings would be inconsistent with the Sunshine Law.
The Hawaii Kai Neighborhood Board requested access to the emergency ambulance service logs maintained by the Department of Health of the City and County of Honolulu. It was held that these logs constitute "personal records" that are not subject to disclosure because such disclosure would violate the right of privacy of persons involved.

A consulting firm asked to look at the payroll records of a firm under contract to the City to construct a gymnasium financed by General Improvement Bond Funds. The Corporation Counsel responded that the records were "not the property of the City and are therefore not public records...." In addition, the Corporation Counsel held that the information requested would be considered a "personal record" and exempt from disclosure under Chapter 65, HRS.

In response to an inquiry, the Attorney General found that "the role of the standing and select committees of the Board of Regents is of such significance in the conduct of the Board's business that the meetings of the committees must be conducted in accordance with the Hawaii Sunshine Law." The AG found that the law does not explicitly apply to a subgroup of a board. However, to exempt the committees of the Board would "permit members of a board to evade the open meeting requirement of the Sunshine Law merely by convening themselves as 'committees,' thereafter discussing and deliberating upon board business in meetings closed to the public, and making only pro forma decisions at the open public board meetings." This would clearly be contrary to the intent of the Sunshine Law and, therefore, the AG concluded that committees must comply with the open meeting provisions.

The Corporation Counsel advised the County Council that a proposed rule to restrict public testimony to committee meetings would be inconsistent with the Sunshine law as amended in 1985. "Therefore, we conclude that the proposal to limit an individual's right to testify on a specific item to only one council meeting is not a 'reasonable administration of oral testimony by rule.' It is likely that a court would find it to be an infringement of the public's rights...."
In response to an inquiry from Goro Hokama, chair of the Maui County Council, the Attorney General issued a lengthy (12 pages) ruling interpreting the 1995 amendments to the Sunshine Law. The opinion carefully examined the definition of a "board" and concluded that the Sunshine Law is applicable to the county councils. Further, the AG concluded that "the county council may not delegate the responsibility of hearing oral testimony or receiving written testimony on items to its committees and thereby preclude interested persons from testifying on those items at meetings of the county council...." Finally, the Attorney General held that "an opportunity to testify must be provided at every council meeting on agenda items, even if a public hearing on the item has been held."

The Neighborhood Commission asked whether a Neighborhood Board member could vote by proxy at a regular or special meeting. The Corporation Counsel held that neither state nor city law has "any provision conferring upon members of any board or commission the right to vote by proxy. In the absence of such provision, it is our opinion that members are only authorized to vote in person." In addition, although a board member could participate in a meeting by telephone conference call "for attendance and informational purposes, a member needs to be physically present to vote."

In a letter opinion addressed to the chairman of the State Civil Defense Advisory Council, the Attorney General concludes that the Council is not subject to the open meeting requirements of the Sunshine Law. The opinion refers to two statutes, Section 2U-21 HRS and Section 1U-4 HRS. According to the AG, these statutes do not require the Council to hold meetings or to have a quorum, nor is any official action required of the Council. Therefore, the Council is not a "board" for purposes of the Sunshine Law. "First, as we concluded, supra, the Council is not a 'board' under Section 2U-2(1). Second, no quorum is required. Third, the Council is not empowered to 'make a decision or deliberate toward a decision.'" This view is based on the finding that the Council "is not required to make a decision as a body."

During deliberations over the proposed Wainia Subdivision, the City Council requested the list of people who had submitted applications in response
YR/MON/DAY | SRC. | ABSTRACT
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86/04/23 | Attorney General letter | to published advertisements. The Corporation Counsel held that the list is a "personal record" as defined by Section 92E-1 HRS. Further, the Corporation Counsel found that the statute does not provide for release of personal records to legislative agencies of the state or counties. Therefore, it was determined that the law requires that the list be maintained on a confidential basis and not released to the City Council.

86/05/12 | Attorney General Opinion No. 86-14 | In response to a request for information, the Attorney General wrote that "our office documents are protected by the attorney-client privilege, executive privilege and specific statutory privileges." The letter went on to state that "we [the Department of the Attorney General] are the attorneys for state government and the government agencies and officials, not for individual private citizens of this State. If we were considered to be attorneys for individual private citizens, we would not be able to represent the state government or its agencies or officials in any case involving a private citizen, because there would be a potential conflict of interest in representation."

Dept. of Commerce and Consumer Affairs Letter | | The Federal Bureau of Apprenticeship and Training asked the Apprenticeship Division of the State Department of Labor and Industrial Relations to disclose information about Hawaii apprentices. The requested information included the apprentice's name, social security number, birth date, sex, ethnic code, and veteran code. The requested information would be used only to derive statistical data "purged of individual identification criteria." The Attorney General responded that "while recognizing the merits of a computerized system of record keeping, we were unable to locate any statutory authority enabling the Apprenticeship Division to release the information requested. Therefore, we respond to your inquiry in the negative." According to the Attorney General, Chapter 92E HRS prohibits disclosure of this information to this federal agency, even for research and/or statistical purposes.

Copies of financial audits of offices within the State Department of Commerce and Consumer Affairs were requested by a local business. The agency director responded in writing that a financial audit of the Hawaii Public Broadcasting Agency was available for inspection. "However, Department of the Attorney General has informed us that copies of the audit are not considered
public records, and therefore it is my understanding that HPBA will only allow public inspection." [Note: This position appears to be contrary to the language of Section 92-21 HRS, which states that copies must be made available of any document that is open for public inspection.]

The Police Department requested clarification of the circumstances under which they can release confidential information to a "duly authorized agent" of the individual involved. The Corporation Counsel advised that a person could name their employer as "duly authorized agent". This would be true whether the employer is an individual or a corporation. In the case of a corporation, the written authorization should refer to the specific individuals who will exercise the right of access. The police were advised to require authorization to be in writing and notarized. Finally, requests for documents can be handled by mail if this is otherwise allowed by the agency's rules.

The staff attorney for the Honolulu Ethics Commission provided a legal memorandum reviewing the meaning of the term "executive session". The memo notes that there have been few legal cases interpreting this provision of the law. Only two Hawaii cases were found, and only four from other parts of the country which define the term. The clearest definition comes from an Ohio Supreme Court case, which defines an executive session as "one which is limited to the members of the governmental body and such other persons as are specifically invited by such body to attend the meeting. The test is not who is present at a meeting of the governmental body, but whether the meeting is open to the public." This is essentially taken from the plain dictionary meaning, which is "a session closed to the public."

A Painters' Union committee went to court to compel the State Department of Labor and Industrial Relations to disclose its findings in the case of a contractor accused of fraud. The union had filed a complaint alleging that a contractor has filed fraudulent payroll affidavits with the state. The Department of Labor and Industrial Relations investigated, but refused to disclose the result of its investigation. After reviewing the documents, the Court ordered that the findings be made public. Painting Industry Recovery Fund vs. Robert Gilkey, director of Labor and Industrial Relations, and the State of Hawaii.
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by

Ian Y. Lind

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<table>
<thead>
<tr>
<th>KEYWORD</th>
<th>YR/MON/DAY</th>
<th>SUMMARY</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td>78/08/14</td>
<td>Lists of names and addresses not available without consent</td>
<td>HonCC</td>
</tr>
<tr>
<td>Ambulance</td>
<td>85/07/11</td>
<td>Police officers may be permitted to review ambulance reports</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>85/10/11</td>
<td>Ambulance report forms cannot be disclosed to neighborhood board</td>
<td>HonCC</td>
</tr>
<tr>
<td>Archives</td>
<td>75/05/27</td>
<td>Municipal archives records subject to certain controls</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>77/02/03</td>
<td>Royalty schedule proposed for commercial use of city materials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Arrest</td>
<td>79/01/12</td>
<td>Information on arrest of a city employee may be disclosed to dept head</td>
<td>HonCC</td>
</tr>
<tr>
<td>Arrest.Record</td>
<td>78/03/08</td>
<td>Criminal history information can be disclosed to reporter for research</td>
<td>HonCC</td>
</tr>
<tr>
<td>Civil.Service</td>
<td>84/08/08</td>
<td>Civil Service records may be disclosed to department officials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Commercial.Use</td>
<td>75/05/27</td>
<td>Municipal archives records subject to certain controls</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>77/02/03</td>
<td>Royalty schedule proposed for commercial use of city materials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Crime</td>
<td>78/03/09</td>
<td>Criminal history information can be disclosed to reporter for research</td>
<td>HonCC</td>
</tr>
<tr>
<td>Driver_LICENSE</td>
<td>86/10/07</td>
<td>Information from drivers license and vehicle registration confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Election</td>
<td>71/12/27</td>
<td>Voter registration affidavit is a public record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Employment</td>
<td>79/01/12</td>
<td>Information on arrest of a city employee may be disclosed to dept head</td>
<td>HonCC</td>
</tr>
<tr>
<td>Employment_practices</td>
<td>83/01/19</td>
<td>Final determination of hiring complaint a personal record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Grant</td>
<td>83/01/19</td>
<td>Final determination of hiring complaint a personal record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Law.Enforcement</td>
<td>75/04/02</td>
<td>Liquor Commission staff not law enforcement officials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Legislature</td>
<td>85/08/13</td>
<td>Employee medical data confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Liquor.Commission</td>
<td>75/04/02</td>
<td>Liquor Commission staff not law enforcement officials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Manual</td>
<td>87/06/31</td>
<td>Agency procedure manual a public record</td>
<td>Au</td>
</tr>
<tr>
<td>Medical.Record</td>
<td>85/11/11</td>
<td>Ambulance report forms cannot be disclosed to neighborhood board</td>
<td>HonCC</td>
</tr>
<tr>
<td>Medical.records</td>
<td>77/08/13</td>
<td>Medical report of prisoner may be released to attorney</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>86/08/13</td>
<td>Employee medical data confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Medical_report</td>
<td>84/04/08</td>
<td>Civil Service records may be disclosed to department officials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Motor.Vehicle</td>
<td>86/10/07</td>
<td>Information from drivers license and vehicle registration confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Neighborhood.Board</td>
<td>85/11/11</td>
<td>Ambulance report forms cannot be disclosed to neighborhood board</td>
<td>HonCC</td>
</tr>
<tr>
<td>Newspaper</td>
<td>73/03/09</td>
<td>Criminal history information can be disclosed to reporter for research</td>
<td>HonCC</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>86/07/30</td>
<td>Police Commission complaint files may be disclosed to Ombudsman</td>
<td>HonCC</td>
</tr>
<tr>
<td>Payroll</td>
<td>87/05/19</td>
<td>Certified payroll records from public works projects held confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Personal.Record</td>
<td>83/01/19</td>
<td>Final determination of hiring complaint a personal record</td>
<td>HonCC</td>
</tr>
<tr>
<td></td>
<td>83/12/30</td>
<td>Privacy provisions of Chapter 92E supercede City rules in most cases</td>
<td>HonCC</td>
</tr>
<tr>
<td>KEYWORD</td>
<td>YR/MON/DAY</td>
<td>SUMMARY</td>
<td>SOURCE</td>
</tr>
<tr>
<td>---------------------</td>
<td>------------</td>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Personal. Records</td>
<td>76/06/14</td>
<td>Lists of names and addresses not available without consent</td>
<td>HonCC</td>
</tr>
<tr>
<td>Personal. Records</td>
<td>86/04/13</td>
<td>Employee medical data confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Personal. Records</td>
<td>87/05/19</td>
<td>Certified payroll records from public works projects held confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Photographs</td>
<td>77/02/03</td>
<td>Royalty schedule proposed for commercial use of city materials</td>
<td>HonCC</td>
</tr>
<tr>
<td>Police</td>
<td>76/03/09</td>
<td>Criminal history information can be disclosed to reporter for research</td>
<td>HonCC</td>
</tr>
<tr>
<td>Police</td>
<td>76/01/12</td>
<td>Information on arrest of a city employee may be disclosed to dept head</td>
<td>HonCC</td>
</tr>
<tr>
<td>Police</td>
<td>03/07/11</td>
<td>Police officers may be permitted to review ambulance reports</td>
<td>HonCC</td>
</tr>
<tr>
<td>Police. Commission</td>
<td>86/07/30</td>
<td>Police Commission complaint files may be disclosed to Ombudsman</td>
<td>HonCC</td>
</tr>
<tr>
<td>Prison</td>
<td>77/07/27</td>
<td>Medical report of prisoner may be released to attorney</td>
<td>HonCC</td>
</tr>
<tr>
<td>Privacy</td>
<td>76/08/14</td>
<td>Lists of names and addresses not available without consent</td>
<td>HonCC</td>
</tr>
<tr>
<td>Privacy</td>
<td>03/01/19</td>
<td>Final determination of hiring complaint a personal record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Privacy</td>
<td>03/12/30</td>
<td>Privacy provisions of Chapter 52E supercede City rules in most cases</td>
<td>HonCC</td>
</tr>
<tr>
<td>Privacy</td>
<td>06/08/13</td>
<td>Employee medical data confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Privacy</td>
<td>07/05/19</td>
<td>Certified payroll records from public works projects held confidential</td>
<td>HonCC</td>
</tr>
<tr>
<td>Procedures</td>
<td>87/08/31</td>
<td>Agency procedure manual a public record</td>
<td>AG</td>
</tr>
<tr>
<td>Reputation</td>
<td>03/01/19</td>
<td>Final determination of hiring complaint a personal record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Research</td>
<td>76/03/09</td>
<td>Criminal history information can be disclosed to reporter for research</td>
<td>HonCC</td>
</tr>
<tr>
<td>rules</td>
<td>03/12/30</td>
<td>Privacy provisions of Chapter 52E supercede City rules in most cases</td>
<td>HonCC</td>
</tr>
<tr>
<td>Senior. Citizens</td>
<td>76/08/14</td>
<td>Lists of names and addresses not available without consent</td>
<td>HonCC</td>
</tr>
<tr>
<td>Voter. Registration</td>
<td>71/12/27</td>
<td>Voter registration affidavit is a public record</td>
<td>HonCC</td>
</tr>
<tr>
<td>Workers. Compensation</td>
<td>04/08/08</td>
<td>Civil Service records may be disclosed to department officials</td>
<td>HonCC</td>
</tr>
</tbody>
</table>
State election law clearly indicates that the voter registration affidavit is a public record which is open to public inspection, and the information may be used for any lawful purpose. The Corporation Counsel therefore advised that New York Life Insurance Company could inspect and copy such information for purposes of soliciting life insurance agents.

The Corporation Counsel held that investigators and staff of the Liquor Commission are not law enforcement officials and therefore would not have access to records which can be disclosed only to law enforcement officials.

The Corporation Counsel advised that certain "personal papers and records of living mayors, and the personal records of other City employees and officers" may be exempt from public disclosure. It was also determined that the archives could place controls on the commercial exploitation of records such as old photographs of Honolulu.

In reviewing a request from Kamaaina Graphics for permission to borrow and reproduce photographs in the City's Municipal Reference and Records Center, the Corporation Counsel determined that no authority existed for public use of the Center, although the public was allowed access as a matter of practice. It was recommended that the Charter and applicable ordinances be amended to recognize public use and that either commercial use be restricted or a royalty schedule be adopted.

The City Physician asked whether a report of a medical examination of a prisoner could be released to the prisoner's attorney. The Corporation Counsel determined that because the prisoner "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."

The Chief of Police asked whether criminal history information could be released to a reporter for the Honolulu Advertiser conducting a study of Hawaii's criminal justice system. It was held that such release for research purposes would not violate either state or federal law, providing that the
researchers protected the data from further disclosure and that anonymity of the individuals involved be assured prior to publication. It was also noted that "the press and the public have a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies."

The publisher of a senior citizen newspaper asked the city Office of Human Resources to provide a list of names and addresses of senior citizens compiled by the office in the implementation of federally funded program for the aged. The Corporation Counsel held that such lists could not be disclosed without obtaining the consent of each person and after informing them of the use to which the information was to be put. "In the absence of consent, such personal information shall remain confidential."

The Chief of Police asked whether the department could inform the employee's department head if the employee were arrested by HPD. The Corporation Counsel held that such disclosure would depend on the circumstances of the arrest. It was held that the routine dissemination of arrest information would not be consistent with the intent of existing law. However, it was held that "in exceptional cases where a City employee commits a serious offense and the nature of the offense is such as to indicate that the person or property of his fellow employees or the general public with whom he comes in contact during the course of his employment might be placed in jeopardy" then the Police Department could inform the department head of the arrest. It was also noted that the police booking log is considered public information and that a department head could examine the log personally.

The office of Senator Neil Abercrombie requested a copy of the final disposition of a complaint regarding alleged violations of CETA hiring practices contained in a letter from the federal grant officer. The grant officer found sufficient evidence to conclude that some violations had occurred. The Corporation Counsel found that the letter was a public record, but that it was not subject to disclosure because it could affect the character and reputation of persons found not to have violated any laws. Further, it was held that the letter was also a personal record and Chapter 92E HRS precluded
The Corporation Counsel was asked to clarify the applicability of the existing rules of the Managing Director to the release of "personal records" as defined by the Fair Information Practice Act (Chapter 92E HRS). The Corporation Counsel determined that "Chapter 92E, HRS, governs determinations regarding access to 'personal records' even if said personal record is also a public record or a 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.
Additional Opinions: Dec. 1987

<table>
<thead>
<tr>
<th>Date</th>
<th>Source</th>
<th>Abstract</th>
</tr>
</thead>
<tbody>
<tr>
<td>86/07/30</td>
<td>Honolulu Corporation Counsel Op. 86-26</td>
<td>The State Ombudsman's Office asked to review records of the Police Commission pertaining to an individual complaint. It was held that the records could be provided, but that the Commission could &quot;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.&quot;</td>
</tr>
<tr>
<td>86/08/13</td>
<td>Honolulu Corporation Counsel Op. 86-28</td>
<td>Dr. J. David Curb requested access to confidential medical data on city employees for use in a high blood pressure program funded by the National Institute of Health. Such records were found to be personal records as defined by Chapter 92E HRS, and it was determined that neither Dr. Curb nor the City Physician would fall explicitly in an exemption under the statute. Therefore, it was held that the data could not be made available. It was suggested that the alternative of seeking voluntary release by individual employees be pursued. In addition, it was noted that while such data could be provided in response to a request of the legislature, names of patients should first be deleted.</td>
</tr>
<tr>
<td>86/10/07</td>
<td>Honolulu Corporation Counsel Op. 86-36</td>
<td>An attorney representing a client in a quiet title action involving real property situation in the County of Hawaii requested access to information about certain individuals that was held by the Automobile Registry and Driver Licensing Division of the Department of Finance, including date of birth or death, marital status, address and phone number, etc. The request was based on the attorney's responsibility to make an effort to identify all persons with a potential interest in the property. The Corporation Counsel found that administrative rules of the statewide traffic records system allows disclosure under certain conditions, including when disclosure is required &quot;by a specific compelling state interest&quot;. It was held that the information could thus be disclosed if &quot;adequate assurances of the legitimate use&quot; were obtained, and a surety bond secured.</td>
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</tbody>
</table>
| 87/05/19   | Honolulu Corporation Counsel Op. 87-8                | A representative of the Operating Engineers' Trust Fund requested copies of certified payroll records submitted to the city's Department of
Public Works by Geo Engineering for work done under contract to the city. The Corporation Counsel held that the payroll records constituted personal records as defined by HRS Section 92E-1. It was further held that such records could not be released unless the requester "submits documentation that it is the duly authorized agent" of the individuals to whom the records pertain, and in addition that "written notarized permission for the release" is obtained from those individuals.

Although a procedure manual of the Public Welfare Division of the Department of Human Services was held to be exempt from disclosure under Chapter 91, the Attorney general concluded that it was a public record as defined by Chapter 92HRS and therefore subject to public disclosure. The Department was advised to make the procedures manual available to the Legal Aid Society of Hawaii.
ALASKA'S PRIVACY law was used to overturn that state's marijuana law with a ruling that what people did in the privacy of their own homes was their own business.

Hawaii legislators did not want that to happen here. They feared that if they did not give legislative direction to Hawaii's amendment, the courts would make their own determinations of the Constitution and strike down Hawaii's marijuana laws.

The privacy law does work in another direction. Hawaii was one of two states that refused to give U.S. Selective Service officials a list of licensed drivers so that the service could find out the addresses and names of all Hawaii males between the ages of 18 and 23. The service was trying to find the men who hadn't registered for the draft.

Hills said this was a victory for the privacy law, protecting records from disclosure to others "for purposes other than they had originally been collected for," she said.

HILLS SAID ACLU supports efforts to prevent "government intrusion into citizens' lives"—such as police spying and gathering of highly personal information from individuals, she said.

Problems with the privacy law appear to stem from the "enforcement and interpretation" of the law, Hills said, noting that there is "inconsistencies among state agencies in handling public records."

"The agencies appear to be 'interpreting the law almost to their own convenience,'" she said.

Common Cause last year asked the DSSH to release an internal report on a prison shakedown, but DSSH officials refused, citing privacy, Lind said.

"I don't think anyone envisioned allowing an executive department to cover up misconduct," Lind said. "The courts have held in the past that the public's right to know in cases of government misconduct outweighs personal privacy."

The law is "ambiguous," Lind said, because almost any government document is going to contain the name or identifying sign of an individual.

State attorneys "must stop being obstructionists," Lind said. If the law "is read in a reasonable way," many of the problems with open government records would disappear, he said.
Day-Care Records Issues
Debated in State House

By Hildegaard Verploegen and Gregg K. Kakesoko

Deputy Attorney General Tom Farrell today said the state will be required to keep two sets of records if the House adopts its version of a bill designed to permit public inspection of files on preschools and baby sitters.

Farrell also said that less information would be available on preschools and baby sitters if the House has its way.

But House Human Services Chairman Marshall Ige said the administration's proposal, backed by Farrell, would have discouraged people from filing any complaints.

This is how the two proposals differ:
Under the measure proposed by Farrell and the Department of Social Services and Housing, the department would continue to keep only one set of records for the 356 preschools licensed by the department. The state's 190 licensed baby sitters were not included in Farrell's original proposal, but they are covered by the House version.

The only names which would be blacked out would be those of a complainant and only upon request, Farrell said. However, no complaints would be listed unless they were fully investigated.

The bill approved yesterday by the House Human Services and Education Committee, however, would have all names omitted, except for the name of the preschool or baby sitter named in the complaint.

IN ADDITION, all complaints would be made public two weeks after they were filed, even if a departmental investigation was still underway.

Ige said this route was chosen by the two House committees because they believe that if all the records were kept intact no one would come forth with a complaint.

Ige said that Farrell's proposal would have discouraged participation.

"No one would have come forth because of fear their names or addresses would be made public," Ige said.

Farrell maintains that the administration proposal would have meant the availability of more information and less work because only one set of records would have to be kept.

"We wouldn't have to keep two sets of records and sanitize one of them for public review," Farrell said. "And more information would have been available."

Farrell said that under his proposal only the name of complainants, if requested, would be released.

Turn to Page A-13, Col. 1
Day-Care Measure Debated in House

Continued from Page One

have been blacked out. The committee's proposal calls for the omission of not only complainants' names but also the names of parents, students, and departmental staff members appearing in the complaint.

THE PROPOSED bill now goes to the floor of the House for a vote next week. But the measure must face another round of hearings in the Senate if it passes the full House next week.

In addition to the public records section, the measure would require the department to:

--Continue to inspect each facility annually.

--Limit temporary licensing permits to no more than one year.

--Force any person who charges for babysitting to be licensed.

However, a person who does not charge a fee for babysitting would not have to be licensed, as is the case under the present law.

Blood relatives providing child care are excluded from the licensing requirements under the present law and no changes were made in those exclusions.

The changes were approved after the House Education and Human Services committees met for nearly three hours and heard overwhelming testimony from child-care providers who opposed releasing complaint information until after a departmental investigation.

The two committees decided to go with public disclosure after 10 working days since Jare Okubo, head of the department's preschool licensing unit, said it was care that an investigation took longer than three weeks.

Farrell told the committees the department wants all investigations to be completed before allowing them to become part of the public record.

A time limit, such as 10 working days would hamper an investigation, Farrell said, and "It could blow our whole case."

"If you cut our investigation short and you do not get the evidence, then the guy is back in business," he said.

LAST WEEK the Star-Bulletin reported that parents aren't allowed to review either the complaint or the inspection records for any of the state's day-care centers and preschools, as well as the records of babysitters licensed to do business here.

The amendments were proposed by the state administration after the Star-Bulletin's reports.

Child care is a major issue in Hawaii because the state has one of the nation's highest percentages of working-parent couples.

The abduction of three children from a Kailua school focused attention on the state's regulation of child-care facilities.

The Star-Bulletin has reported that Hawaii's regulations are not as strong as adopted by many other states, and that the number of inspectors in Hawaii is too small to monitor compliance adequately, based on the experience of other states.

"The need for open government is particularly urgent when the issue is whether the state is adequately protecting children," Star-Bulletin Managing Editor William Cox said today. "The legislature seems on its way toward letting the press and therefore the public — find out the answer to that question."

He said the dispute over access to complaints and inspection records "is only part of the larger problem of government's misuse of the state's privacy law to close off public scrutiny of records that disclose how government operates."
Rohlfing proposed bill to liberalize information access

State Rep. Fred Rohlfing, R-13th Dist. (Kahala-Diamond Head-Kaimuki), said yesterday he made a proposal earlier this year that would have substantially liberalized Hawaii law governing privacy and access to information.

The proposal was contained in a bill that — for a variety of reasons — didn’t get a hearing or much public discussion, Rohlfing said.

Rohlfing brought up the matter again in the wake of controversy over the state’s refusal to release information regarding licensed preschools and day-care centers.

A public hearing on an administration-backed proposal to at least partially open government files on preschools is scheduled for this morning in the House Human Services and Education Committee.

Whether his proposed legislation would have directly affected the preschool situation can’t be determined unless “we take the specific and run it through the maze of the bill,” Rohlfing said. But in general, he said, he believes current state law on public information is far too restrictive.

“I think the statutes are very very tight. In this day and age, it is not a law that is up to snuff in terms of public access.”

Rohlfing said he was particularly disturbed by closed meetings on the pesticide contamination problem and by clamps on information concerning state regulation of local thrift and loan companies.

“If I, or my staff, is getting the runaround, what would they do to the average citizen?” he asked.

Rohlfing’s proposal, which is dead at the Legislature this year, contained several changes to existing public record law including those which would:

• Include “informal” committees such as the pesticide advisory group within the open-meeting section applied to agencies and organizations set up by law. Every employee or other entity of the executive branch at both state and county would have been covered.

• Expand the types of information that are covered by the sunshine access law. Today the law cites only written or printed material. The bill would add computer information, photographs and films, electronic data or “other material regardless of physical form.”

• Define a public record as any information that comes into the possession of a public employee in the course of daily business. Today’s law is narrower, defining a public record more as anything required by law to be received or filed.

• Liberalize the rules covering photocopying of records; availability of documents; and the time needed to comply with a request for information. New penalties are added — including the possibility of damages — for denial of access.
Files on Child Care Are Usually Open Elsewhere

By June Watarabe

"not official" but are based on his 25-year interest in child-care regulations.

Although it is difficult to generalize about the subject, a "valid statement," Class said, is that child-care licensing records generally tend to be open records.

"Some states a few years ago kept that kind of information secret, and some may still be behind the times," he said.

Turn to Page A-7, Col. 6
Care Open in Other States

Continued from Page One

Class, a social work professor emeritus at the University of Southern California, has worked as a child-care licensing consultant since 1972 for the states of Texas, North Dakota, South Dakota, Kansas, Missouri, South Carolina, Delaware, Maryland, Virginia, Pennsylvania, Illinois, Michigan, Ohio, Oregon and Maine.

He said that in states where such records are open, there is “an almost rabid advocacy that they should be (completely) open.” The premise, Class said, is that because a state gives a business a license to operate, that business should be open to public scrutiny.

In states with modified openness provisions, records generally are not made public when a complaint is being investigated, he said. But if there is an attempt to revoke a person’s license, Class said the records then may be opened to at least that one person.

A few states have provisions to expunge from the records any complaint that has been investigated and found to be unsubstantiated, Class said.

A CHECK WITH FOUR states upheld Class’ assessment of a general pattern of open records, subject to certain restrictions. The primary restriction is in keeping the names of children confidential.

In California, for example, there is a state law allowing the public to review records not only on child-care centers, but any other licensed operation as well.

“Ninety percent of the material (contained in those files) are public record,” according to Carla Goodman, spokeswoman for the Department of Social Services. That includes the name of the licensee, when the license was granted and whether there have been complaints lodged against the licensee.

Information that would be kept confidential would be such things as the name of a child or a matter of a personal nature, such as the financial background of the licensee, Goodman said.

Colorado also is governed by an open information act, according to Elizabeth Kester, state licensing administrator.

“By statute, any individual can make a request to look at a child-care center record,” she said.

However, Colorado does keep confidential certain types of information, such as names of children and facts learned about them and their families, specific medical records, or any internal communication with an attorney, she said.

Generally, however, Kester said Colorado does allow the contents of complaints and investigations to be a matter of public record, including records from other sources, such as the fire or health department.

IN ARIZONA, “OUR FILES are open,” said Beatrice Moore, chief of the Bureau of Day Care Facilities in the Arizona Department of Public Health, which handles the licensing of the state’s 750 child day-care centers.

That means information is released on all complaints, plus the reports of all field trip inspections, she said.

Asked if there are any restrictions, Moore said a person is merely required to sign a sheet saying he or she has looked into the records. She added that “the only names that might be crossed out are names of children that might be mentioned in a complaint under investigation.”

Pat Hedgcoth, the chief of the Nevada Child Care Services Bureau, said she has yet to receive a request to inspect the complaint files of a child-care center. But a quick check with the state attorney general’s office showed that Nevada also has a law which makes all records public unless specifically covered by a confidentiality provision.

Hedgcoth said that there is no such provision covering child-care records.

She said she routinely has informed inquirers if a certain center is on a provisional license, which means that a complaint has been substantiated and the licensee has been told to correct the deficiency within a certain period of time.

“I will give out information if complaints have been documented,” she said. But Hedgcoth said she still intends to screen the type of information given out because she does not feel she can legally release information on any pending complaint until an investigation is completed.
Preschool Directors Back Parents' Right to Know

By June Watanabe
Star-Bulletin Writer

Parents have a right to know if a preschool has been subject to complaints and what the nature of the complaints are, preschool directors contacted by the Star-Bulletin yesterday generally agreed.

Some worried a bit about releasing the names of innocent parties, although they believe officials would have enough discretion to prevent that from becoming a problem. A couple of them wondered if a complainant's right to privacy might be violated, while two suggested alternative methods for parents to evaluate the schools.

After three children were abducted earlier this month from the Windward United Preschool, and one of them raped, the issue of preschool licensing and regulation came to the forefront.

The Star-Bulletin tried to gain access to complaint and inspection files on preschools kept by the Department of Social Services and Housing, which licenses day-care centers in Hawaii. But state officials refused to open the files to public inspection, saying to do so would violate Hawaii's privacy law.

They since have offered to allow the inspection of 10 randomly selected files with all names and other identification deleted.

THE DIRECTOR of Central Union Preschool, Doris Hewick, said, "There ought to be other ways of evaluating a school. I sympathize with the parents' right to know if there have been complaints at a school before they put their child in. But there ought to be another route."

One possible alternative, Hewick said, is accreditation of preschools. She said the National Association for the Education of Young Children apparently is moving to establish an accreditation process in which national standards on day care would be set.

HOWEVER, Laurie Breeden, director of Unity School, Barbara Sleight, director of St. Clement's School, Jerry Richmond, director of Kualaliali Child Care Center, and Marian Walsh, director of Waiokena Preschool, all said they had no objections to the files being inspected, basically because they felt it was important for parents to have that kind of information.

The only thing Breeden said she would object to is having the names of children or other innocent parties revealed, although "I don't see how they would be."

As a sidelight, Breeden, who's proud of the low 6-to-1 pupil-teacher ratio at Unity School, thinks state regulations of preschools could be improved because they are really "minimal."

Turn to Page A-7, Col. 6
Directors Say Parents Have Right to Know

But she agrees with Rewick that it is difficult for DSSH to conduct inspections properly because it is so short-staffed. While Rewick says the answer lies in getting "more warm bodies," Breeden suggested "a decent resource and referral system where parents could get good information on preschools because I wonder how many parents would actually go through the files."

SLEIGHT, of St. Clement's, said, "If parents are interested in putting their child in certain schools, they are entitled to know how many complaints there are, the nature of the complaints and what period of time is involved."

The last point is important, she said, because one complaint 10 years ago may not be relevant. But "that would be up to the interested party to decide," she said.

In that line, Walsh, of Waikele, and Jim Denzer, general manager of Hawaii Child Care Centers, both said it was important that only complete records be released.

The files should show when problems are corrected and that complaints were not made by disgruntled former employees or parents, Walsh said. "They should be logical complaints. But the main thing is if the condition has been corrected," she said.

DENZER NOTED that his organization is probably the second largest preschool operation and the largest after-school day-care program in the state.

"When you have a thousand people who go through our system in a year, you have a certain proportion of nuts and knaves," Denzer said. "In a year, with 500 to 600 pairs of parents, we get maybe two or three cranks. So our concern is that whatever is revealed — and I am, I think we all are, for the principle of the sunshine law — the public should get complete, and not partial, information. That would seem to be fair. We should be protected from that type of complaint."

GUY WARD, executive director of the Kindergarten & Child Care Association, Preschools of Hawaii, also said "you have all kinds of cranks in the community who might have reasons to complain."

But he said he's concerned mostly about the right to privacy of both the complainant and the target of the complaint, as well as the possible effect such public inspection might have.

"I think that if everybody has access to the files, it will tend to dry up legitimate complaints to DSSH," Ward said. "I think DSSH should be able to tell parents if a preschool has been refused a license or if there is a legitimate reason that it is not authorized to operate."

On protecting the privacy of the complainant, Denzer says he doesn't see that as an issue.

"I don't really give much credence to anonymous complaints," he said. "If a person is not forthright enough to give a name, I don't give it as much credence as I have been extra aware of the need for security.
In day-care records

Toward state openness?

Governor Ariyoshi is to be commended for feeling the public is entitled to more information regarding complaints made against state-licensed preschools and day-care centers.

But there's still a long way to go before the public gets the information it is entitled to about the operation of its government in this and many other matters.

The issue is before us again because of the abduction and brutalization of three small children from a Windward Oahu preschool. One child was raped.

The Advertiser and the Star-Bulletin were turned down when they requested files on inspections of and complaints against all preschools and day-care centers. The attorney general's office said that was because such files contain information on individuals and so are protected by state privacy laws. Conflicts between such privacy laws and the sunshine law are cited.

To its credit, the Department of Housing and Social Services, which licenses day-care facilities, wants to change the current law to allow more public access to such files. Ariyoshi supports the change.

That is to the good. The need for the public to have more such information on the reliability of preschools and day-care centers is obvious. Moreover, it can be provided in ways that protect individuals against unjustified charges.

And that is only one area of government records that could be opened more to the public.

Where there is some merit in clearing up clashes between the privacy and sunshine laws to the extent possible, we would note that the preschool matter is not an isolated case.

In fact, the media have been fighting something of a running battle with the state government in the past couple of years on excessive secrecy on issues that include sewer records, government contracts, milk hearings and the problem of pesticides in our water supply.

Part of the problem is legitimate differences over what laws say. But as much or more appears to be a question of attitudes against openness in various segments of the state administration, especially in the attorney general's office.

Where government should be as open as possible, all too often we seem to have gotten an administration that will not open up until forced to.

Thus, Governor Ariyoshi's attitude on the preschool matter, while not fully spelled out, seems to be a step in the right direction.

But, again, changing legal language is not enough. It will take more leadership in attitudes for his administration to meet the standards of openness in government necessary for Hawaii's public to be properly informed.
Ariyoshi: Public Entitled to Some Day-Care Data

Gov. George Ariyoshi yesterday said that the public might be entitled to some information in investigative reports of justified complaints against state licensed child-care centers.

When asked by reporters if the public should be able to see information leading to corrections in child-care facilities, Ariyoshi replied, "I think that maybe some of that kind of information may be that which you're entitled to, and I say it depends on what you're really asking for."

Although he gave no details, he said "information from a licensing point of view" should be made public. However, the governor added, "There are some private matters that require some protection."

The Star-Bulletin reported yesterday that parents can't find out the results of state inspections of day-care and preschool operations and can't learn whether the state has investigated complaints about any of the centers.

The state attorney general says release of the information would violate Hawaii's privacy law.

Files containing investigations of child-care facilities are closed to the public because they contain the names of individual people, according to the attorney general's office.

The Star-Bulletin was denied access to two kinds of records:
- Results of official state inspections of preschools and day-care centers.
- Complaints made about the schools which would show whether the complaints were found to be justified and whether the state took action to solve the problem.

The Department of Social Services and Housing which administers child-care facilities is seeking an amendment to allow public access to complaint and inspection files of preschools and day-care centers, according to Deputy Attorney General Tom Farrell.

Asked if parents should be able to find out if there are complaints lodged against a particular facility, Ariyoshi said, "I don't think that anybody ought to be hurt by somebody just complaining against them. Anybody can complain, and you can find the body."

Under the attorney general's opinion, parents and the media cannot learn if any complaints were found to be valid by the state, or whether the state took any action to solve the problem complained about.
WHEN A PUBLIC AGENCY refuses a newspaper’s request to inspect important records, the reaction of the average reader or citizen may be to ask, “Why should I care?”

It’s a fair question.

Here’s one example that may help provide an answer:

The recent abduction of three students — and the rape of one of them — from a Kailua preschool has raised the issue of how well the state regulates childcare facilities.

The Star-Bulletin asked the state attorney general’s office to see the following state records:

- The complaints made to the state about any preschool, and the state’s follow-up report on each complaint.
- The results of annual inspections of child-care facilities.

These records were declared off limits to the newspaper and to the people of Hawaii by the attorney general’s office.

According to the attorney general, Hawaii’s law on privacy requires that the files be kept secret because they contain information about individuals. The state offered to allow the newspaper to inspect 10 randomly selected files on preschool centers, with all names and other identifying information, such as job titles, deleted. The files of 10 preschools would represent less than 5 percent of the total schools licensed by the state on Oahu.

The Star-Bulletin wants to inspect the state’s records on all preschools, not 5 percent of them.

Why?

There are real questions about whether Hawaii is doing all it can or should to protect children in these centers.

In its investigation of how the state regulates child-care facilities, Star-Bulletin reporters have learned:

- Hawaii is near the bottom of the states in the number of adults it requires to supervise children in some age groups: an important issue since the children who were abducted were not noticed missing by the preschool.

- Hawaii has far fewer inspectors than check on how children are treated that most experts believe is adequate. On Oahu, three inspectors must monitor 120 centers each. Many states have much lower ratios: one inspector for every 40 centers.

Hawaii has one of the nation’s highest percentages of working-couple parents.

Finding a reliable preschool or daycare center is a crucial question for thousands of Hawaii parents.

The newspaper would like to help them. That’s why the reader should care that the state won’t allow reporters — or you — to see the records that would help disclose how well Hawaii protects its children.
Judge Refuses to Close Jury Selection at Trial

By Lee Carteroll
Star-Bulletin Writer

A judge refused yesterday to close jury selection proceedings from the public in the first of several pornography trials set to begin in Circuit Court.

Judge Patrick Yim ruled that Randolph Slaton, the attorney for defendant Primitivo Georyzaga, had shown "no good cause" for closing the courtroom because of the explicit questions he planned for jurors.

Attorneys for the Star-Bulletin and the Honolulu Advertiser cited a U.S. Supreme Court ruling six weeks ago that jury selection should have been open to the public in a rape case as a reason for Yim to reject Slaton's request.

Star-Bulletin attorney Dave Dezani said the decision was "so new, so muddled on point" that Yim could not ignore it.

Georyzaga, 45, was among five people arrested in May on misdemeanor charges of promoting pornography after 12 X-rated films, including five duplicates, were confiscated from five Oahu theaters that are part of a Vaulcan Enterprises Inc chain.

Jury selection was to begin today in Yim's court, and Slaton asked that questioning of individual, prospective jurors take place behind closed doors.

He submitted a 48-page list of questions he had planned for the jurors, including queries about their opinions about public sexual conduct and about certain sexual acts.

Slaton said he would be asking jurors, "Some things specific sometimes have difficulty discussing with each other."

The freedom of jurors to talk openly about such matters outweighs the "miniscule imposition of public presence in the courtroom," he said.

Slaton said the questioning of jurors would be "an extraordinary case" in which jurors' right to privacy should override the public's right of access to court.

He also said the news media was "less interested in the case against a 45-year-old projectionist than the nature of the case."

Adversary attorney Jeffrey Portnoy maintained that the jury-selection rights cited by Slaton "come nowhere near the burden that has been placed upon him and upon this court by the United States Supreme Court" in keeping courts open "except in the most extraordinary circumstances."

"No juror has ever been identified by name in Hawaii," he said.

Dezani gave no assurance that the Star-Bulletin would not publish jurors' names. Juries, in fact, have been named on numerous occasions in news stories when quoted about verdicts they had just rendered.
Attorney says state secrecy a 'monster'

By Robert W. Bome

In a speech to a media group, a Honolulu attorney came down hard on increased secrecy by the state, which he said harbors a "monster" trying to "devour most public access to records in our government.

Jeffrey S. Portnoy, a specialist on constitutional freedom of information issues and attorney for KHON-TV News and The Honolulu Advertiser, also received a Freedom of the Press Award from the Hawaii Chapter of the Society of Professional Journalists. About 40 persons attended when the Society joined with Women in Communications for a luncheon meeting at the Halekulani Hotel.

In a speech titled "Sunshine in Hawaii: Do We Have It in Government?" Portnoy blasted secrecy at all levels of government, including the operation of the Honolulu Police Commission and the "anti-media and anti-public" police department on the Big Island. He fired his biggest salvos at the governor and the Legislature.

"At the executive, legislative and ministerial level, it is bad and getting worse," Portnoy said.

Citing several recent instances of secret governmental operations, Portnoy said he was recently "astonished" to find that he had been called on at least 25 times in the past five years "to provide legal services as a result of closed meetings, closed records and closed courtrooms...."

"It does not include cases where media I do not represent or citizen groups protested closed public meetings," Portnoy said.

He recalled that nine years ago, the Legislature passed a policy that government operations would be "conducted as openly as possible." He said that "the dream" has been turned into a nightmare partly because times have changed on a national level.

"The post-Watergate era has vanished into a time of secrecy. In Washington, D.C., President Reagan has launched an unprecedented attack against press and public access to government," Portnoy continued.

"In Hawaii, there has been no leadership from the governor or his attorney general in supporting open government," Portnoy continued. "Despite the governor's protests to the contrary, this is not an open administration."

The attorney said media pressures, however, have often forced openness from state authorities. He gave three recent examples:

- "This state administration attempted to seal secure records kept by the state Department of Health until a circuit court judge ordered them released.
- "This administration refused to release a report prepared by a security guard company as to why it deserved to be awarded a public contract until a television station threatened litigation.
- "This administration tried to close hearings on the importation of Midland milk until it became clear that all of the other participants to the hearing except the state understood the importance of allowing public access to those proceedings...."

Portnoy said the Legislature was often as bad and sometimes worse than the executive branch on the openness issue.

"Perhaps it has chosen to ignore its own declared public policy of this state," he said. "Committees meet in secret; budgets are produced by draft, and public documents such as work sheets are generally called internal documents."

The attorney said city and county governments are not immune from the "mentality toward a closed government," saying that restrictions are placed on reporters by Big Island police and "police records on arrests have vital information deleted or censored."

And in Honolulu, he noted that the police commission "still does not release the names of police officers against whom charges of corruption, criminal activity, and/or citizen abuse are sustained...."

Portnoy also criticized the Legislature for passing a hastily and poorly drafted Public Information Practice Act in 1980 which had "laudable purposes" to protect individual privacy in certain cases at whose face had been painted "to deny access to the media and public to practically all state records."

He said the effect was to make it a crime to disclose virtually any record that uses someone's individual's name to someone other than the person named.

Portnoy said the misuse of this privacy law has carried on for the past four years.

"It makes no difference whether that individual is an elected official, a civil servant paid out of public funds, or a eunuch," Portnoy said.

"We are used to deny legitimate public access to state documents."

"It has, quite frankly, grown into a monster that will, if not amended, devour most public access to records in our government," he said.
Bill to Extend Eavesdrop Law Gains

By Bruce Dunford
Associated Press Writer

The House Judiciary Committee has approved a bill that would give an indefinite extension to the law—which expires in June—allowing police to electronically eavesdrop on criminal suspects to gain evidence.

But the committee Wednesday declined to allow such eavesdropping in homes, hotel rooms and other private places without first obtaining a warrant.

Both the House and Senate Judiciary committees were reluctant to remove the warrant requirement, which police and prosecutors claimed was not needed as long as one of the members of the conversation was aware of the eavesdropping.

Deputy City Prosecutor Tom Pico said that unless it involves a privileged conversation between a husband and wife or a lawyer and his client, there is no constitutional guarantee of privacy.

The second party in the conversation could always be a "false friend" and testify about what was said. A tape recording of such a conversation would serve merely as a method of assuring the truth of the testimony, Pico said.

SEN. NEIL Abercrombie disagreed. "I feel I should have a right to expect privacy and to have a judge decide whether or not it should be impeded," he said.

Sen. Ben Cayetano said the state constitution guarantees the individual's right to privacy. He asked why police and prosecutors were reluctant "to take that extra step in obtaining a warrant."

Judiciary Chairman Anthony Chang said he would await the House version of the wiretapping bill, but would want to limit an extension to two years because it is one of the matters being reviewed by the Judicial Penal Code Review Committee.

Chang's committee yesterday heard testimony on a bill that would make impersonating a police officer a major crime.

There has been a recent rash of incidents on Oahu in which women veterans have been stopped by men posing as police officers. First Deputy City Prosecuting Attorney Paul Toyosaka said in prepared remarks:

Such incidents can be a prelude to other crimes, such as kidnaping, rape, assault and murder, he said.

Police Lt. Robert Aton also endorsed a bill to change the offenses from a misdemeanor to a felony.
Police, Prosecutors Seek a Freer Rein on

By Phil Meyer
Star-Bulletin Writer

Honolulu police officers and Oahu, Maui and Big Island prosecutors encountered more skepticism than enthusiasm last night when they asked members of the state House Judiciary Committee to extend, and expand, Hawaii's electronic eavesdropping law.

If the Legislature does not act, the six-year-old law will expire June 5. The state Public Defender's Office and the Hawaii Chapter of the American Civil Liberties Union say it should.

But police and prosecutors, in addition to seeking a six-year extension of the law, want it amended to permit unrestricted eavesdropping in homes, hotel rooms and other "private places" without the knowledge of their primary occupant.

When Honolulu police Lt. Ross Wang told Rep. John Medeiros that use of the law had resulted in five convictions so far, Medeiros endorsed both the extension and the amendment saying, "That's all I need to know. One conviction would have been enough."

HOWEVER, CHAIRMAN Kate Stanley joined several other committee members in questioning the proposed amendment, which the ACLU's Reinhard Mohr insisted would violate privacy guarantees added to the state constitution in 1974.

No other state constitution has such guarantees.

Mohr said that before the committee made any decision, "you should require the police and the prosecutors to tell you how often, and for how long during the past six years, they took part in eavesdropping they didn't take to court."

"Only they know," Mohr continued, "the extent of the invasion of privacy this law has already allowed."

At present, the law permits the use in court of

Eavesdropping

electronic evidence — obtained without a judge's permission — only when one of the persons involved knows that such eavesdropping is being done in a "public place" or that person's residence.

Mohr added, and police and prosecutors admitted, that the single person involved in such cases is almost always a police officer or "an agent of the police."

However, the same law also allows the police and prosecutors to gather electronic evidence without the knowledge of anyone who is being recorded whenever a judge specifically approves such surveillance.
More on privacy

On January 9, 1984, your newspaper ran a letter to the editor entitled "Privacy and the police." In one broad sweep, and with much misinformation, the writer takes cheap shots and labels all police officers and prosecutors overzealous and moody. I take umbrage to those shots and am compelled to respond.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy is a qualified right. It protects against "unreasonable" invasions. It guarantees freedom from invasions of privacy only to persons who are entitled to a reasonable expectation of privacy.

The tests to determine whether a person is so entitled are: has the person exhibited an actual, subjective expectation of privacy; and is that expectation one which society is prepared to recognize as "reasonable."

At issue in the recent case cited is whether society is prepared to accept as reasonable a defendant's claim of privacy rights in another's hotel room; this while he is in the process of distributing illegal drugs.

That issue was not addressed by the Supreme Court. They simply said that the defendant's statutory right to privacy was breached. In other words, a statute governing interceptions was not followed. Having so found, the Supreme Court never reached the constitutional question.

The case of Nurse Miller was used as an example by the writer to illustrate how moody police officers and moody prosecutors can dictate who is to become an instant criminal here in Honolulu. There is no privacy issue involved in that case. Miller did not become an instant criminal. She became an instant traffic violator or offender or when she walked against the red traffic light.

REINETTE W. COOPER, Esq.
Deputy Prosecuting Attorney.
Ruling on warrants, undercover tapes is a ‘slap in the face,’ police chief says

By James Dooley

Police Chief Douglas Gibb yesterday joined City Prosecutor Charles Marland in denouncing a recent state Supreme Court ruling that requires court warrants for police undercover audio or videotape recordings.

"As far as I'm concerned, it's a slap in the face of pro-active law enforcement," Gibb said.

Undercover "sting" operations, which Gibb coordinated before his elevation to the chief's office this year, will be severely affected by the ruling, he said.

Those types of investigations, in which undercover police officers are tape recorded and videotaped while dealing with suspects, will be reduced, according to Gibb.

Such investigations "have produced quality evidence in important investigations concerning narcotics, murder-for-hire, stolen property, and just about every other kind of major case," Gibb said.

Now, under the new Supreme Court ruling, the police first must obtain warrants from the court before commencing surreptitious recording.

The decision drew praise from Acting Public Defender Eric Moon, who said there must be limits placed on police to protect the rights of individuals.

The ruling upheld Circuit Judge Simeon Acoba's decision not to allow police tape recordings as evidence in the trial of Dr. Pershing Lo, who was charged with distributing a dangerous drug after he allegedly gave a barbiturate to a police informant.

Acoba ruled the taping of that alleged transaction without a warrant violated Lo's rights to privacy under a constitutional amendment approved by the voters in 1978.

Acoba also found the taping violated the state's wiretapping law.

The Supreme Court did not address the privacy amendment aspect of Acoba's ruling, but agreed the taping violated privacy provisions in the state's wiretapping law.

"As far as I am concerned, there should be no reasonable expectation of privacy when someone is involved in criminal activity," Gibb said. "This decision is regressive in nature, as far as the police are concerned."

"I have to stress that it doesn't just hurt law enforcement; it hurts the public," he said.

He said the sting operations allowed police to take a "pro-active rather than reactive approach to law enforcement. It allowed us to use modern technology to deal with crime."

"Now we're back to square one," Gibb said.

Many undercover operations are "spur of the moment," he said.

"There's no way we can get court approval on short notice. It can require weeks of paperwork, preparation of affidavits, and so forth, and by the time you go through all that, the case is cold."

"Certainly there are times when you have the time to do that. We will follow the guidelines, but those kinds of cases are the exception rather than the rule."

"I think it's really sad," Gibb said. "Hawaii is really out of the few states in the union, besides Oregon, where you have this difficulty of protecting the privacy rights of criminals."

Marland said this week that the Supreme Court, in ruling "places in immediate jeopardy" pending police undercover "sting" cases.

"Whenever the state court has the opportunity, it goes far beyond the U.S. Supreme Court in providing protection for the defendants at the expense of the general public," Marland said.

He said the ruling "places more importance on a criminal's expectations of privacy than on the public's right to be protected from criminals."

"It means that the justices were looking for any means possible to do away with one of the most effective tools police have ever devised to combat crime."

The state wiretap law "is the most restrictive in the United States," according to Marland.

"It is ridiculous to extend wiretap restrictions to video or audio taping, which is most frequently used in undercover operations involving drugs and prostitution and stolen property."

Moon, who is the acting public defender while Barry Rubin is out of town, said the high court should be "congratulated for issuing a decision it knew would be unpopular."

"The law should not allow the police unlimited means of getting evidence," he said. "There has to be some restrictions to protect individual rights."

Moon said if the government expects individuals to follow the law, the government also must do the same. In the Lo case, police could have obtained a court warrant, he said. "If they're not up on the law, they cannot blame the Supreme Court," Moon added.
Police commission program aims to clarify disciplinary problems

SAT DEC 22 1983

The Honolulu Police Commission has launched a new public information program aimed at giving a clearer picture of the department's disciplinary problems.

Commission Chairman Robert Nakamoto said in a release that the commission will regularly issue reports on complaints made and sustained as well as disciplinary actions taken.

The panel also will report regularly on officers recommended for censure for jobs well done.

Commission Vice Chairman Conrad Geronimo noted that the commission began releasing information on offenses and penalties several months ago. The policy of issuing written releases at each meeting formalizes that procedure, he said.

"We just wanted to share more information with the public as long as we stay within the restrictions of the privacy act," he said.

The commission will report on the general nature of the complaint and subsequent disciplinary action. No names will be released and the report won't contain details of the incident.

Nakamoto's statement said each report would include complaints completed and pending, sustained complaints ratified at each meeting, disciplinary actions taken on complaints upheld by the commission, complaints pending disciplinary action and recommendations sent to Chief Douglas Gibb.

The commission simply reviews complaints and decides whether they are warranted. Decisions about discipline are up to the chief and to the Disciplinary Review Board.

However, Geronimo said he cannot recall a single instance where the commission has been reversed by the review board.
Wiretap Law Due for Renewal

Hawaii Has More Protection for Individuals Than Most States

MON MAY 30 1983 SB 9

By Jane Watanabe
StateHouse Bureau

The state wiretap law—now five years old—comes up for legislative scrutiny and renewal next year, with a fight expected again over provisions in the law aimed at protecting the individual's right to privacy.

At a particular point will be the requirement for an adversary counsel to argue against any wiretap applications. Since the law went into effect in 1978, local law enforcement agencies have asked the Circuit Court for permission to tap telephone lines five times.

According to court records, no wiretap applications were made in 1979 and 1981, but three were made in 1980 and two in 1978. None has been made so far this year.

All five applications involved the Honolulu prosecutor's office, although none in 1979—the first year that wiretaps could be made under the law—was made jointly with the Maui prosecutor. Neither the Big Island nor Kauai prosecutor, nor the state attorney general, has ever applied with the court to eavesdrop on telephone conversations.

It is not known how many of the applications were approved—neither court officials nor the Honolulu prosecutor would say—although indications are that most, if not all, of the five requested wiretaps were allowed. It is known that the first application of the law involved a Mamala Bay murder trial.

Before the law went into effect, law enforcement officials could illegally tap into phone conversations only if one of the parties being bugged agreed to the interception.

But the new law said five persons—the attorney general and the four county prosecutors—could go to court to get permission to wiretap and not worry about getting anyone else's approval.

That was fine with the prosecutors, who had tried for years to get a local equivalent of the federal wiretap law.

But to their chagrin, the 1978 legislature agreed with the Hawaii Crime Commission, the American Civil Liberties Union of Hawaii (ACLU) and others that safeguards were needed to ensure that the eavesdropping would not get out of hand.

In a report submitted at the beginning of the 1978 legislative session, the crime commission proposed a model wiretap statute designed to allow court-ordered wiretapping to fight organized crime in Hawaii, while protecting privacy to the fullest extent possible without crippling law enforcement efforts.

Legislators worried that the proposed bill, but still what finally emerged was a law that deliberately went further to protect individual privacy than either the federal law or most other state statutes about half the states have wiretap laws.

"We're the ones responsible for getting the law on the books," Ed Hinchey, executive director of the Hawaii Crime Commission, says. "The law would not have passed if we hadn't sat down with people who were against it, like the ACLU and public defenders, and said let's try to meet your complaints."

"The ACLU is opposed to wiretaps in any way, shape or form," attorney Mark Davis, a member of ACLU-Hawaii board of directors, said. "Short of all parties consenting, we think one of the dangers is that even if there are legitimate grounds, the abuses can be and have been so severe..."
State's Wiretap Law to Come Under Scrutiny

Honolulu Prosecuting Attorney Charles Marland envisions the law "as a tool of law enforcement to help address criminal activity" and "to balance the interests of the public and the individual.

Marland's stance is based on the idea that wiretaps can provide crucial evidence in criminal investigations, while also respecting individual privacy rights. The law itself is designed to allow law enforcement to tap phones and intercept communications deemed necessary for public safety.
6 Senate Rebels Vow a Filibuster

FRIDAY, FEBRUARY 2, 1973

By Gregg K. Kakesako

Six rebellious senators today
lost their bid to make public
their worksheets detailing the
detailed budget bills the
districts and they and present
with a filibuster on the money pack-
ges bought - a move that could
force the 1974 legislature into
wasting.

Sen. George Nakamura, D-Ewa, ruled that the seven volumes of
budgetary worksheets the senators requested are not "public
documents" and therefore must be
open to public inspection.

After a senate meeting this
morning, Senate Democratic
leader Benjamin Cayetano said he
was "disappointed" by Nakamura's
carousel and acknowledged that a
5% extension into next
week was "a pretty darn good
possibility."

THE DEADLINE for lawmakers
to complete their work this year
is midnight. If the Senate is un-
able to pass the 6.2 million budget
bill and fund the state operations
for the next two years, Gov.
George Ariyoshi or the two
houses of the Legislature could
extend the session. The state con-
stitution forbids weekend sessions
of the Legislature.

Defiant by Neil Abercrombie
leads the way out

of the courthouse this morning after a judge dismissed a suit by
Senate senators seeking to make public worksheets detailing
the proposed state budget. Behind Abercrombie are Sens.
Dante Carpenter, left, Lehua Fernandes Salling and Benjamin

Defiant by Neil Abercrombie said a filibuster would
prevent the Senate from passing a state budget.

Two other senators, Charles
Fischer and Neil Abercrombie,
said they were "determined to
vote" because they didn't have
the seven volumes of work-
sheets which they believe are
vital to their understanding of
what's in the budget.

Senator President Richard
Wong, throughout the week-long
fight, voted that the session will not extend past midnight unless
the Senate votes or passes the
money package by that time.

WONG REPEATED that
promise on the Senate floor yest-

erday when he told his col-
leagues that a vote will be taken
on the budget tonight sometime
after 9 p.m.

Wong yesterday that he
was willing to let senators debate
the budget all day long if neces-
sary but that a vote would take
place before the session ends.

The extensions would delay a
vote on other bills whose passage
is linked to the budget.

Those include legislation that
would appropriate $2 million for
the operating expenses of the ju-

diciary and $1 million for the Of-

cine of Hawaiian Affairs, a $1

per person tax credit, $20 million
public works "more bills," and a $1.5 million bill to help
Kauai teachers pay for the dam-
age caused by Hurricane Iwa.

Wong supporters maintain that
as a matter of good public rela-
tions lawmakers should finish
work without an extension.

They also said they doubt the
defenders will make good their
threat of a filibuster. "Simple
me," one Wong supporter said, "I
doubt if they are up to it."

THE BIG question is
Senate Mavericks

Vow to Filibuster

APR 22 1983 SBN

Compliments from Page One

Whether Wong is willing to risk a
dither ruse in the Senate by call-
ing on his 14 supporters and the
ive-man Republican caucus to
cut off debate and force a show-
down vote. It will take 17 votes to
end debate.

There is no question that there
is enough support in the Senate to
pass the budget. The problem
lies in whether Wong is willing to
gain a fellow senator — an action
that would be contrary to his
style of leadership.

Despite criticisms from many
quarters, Wong has proved him-
self as being "a fair person," al-
lowing prolonged debate on
issues, no matter how insignifi-
cant.

The budget battle spilled into
the courts yesterday when the six
dissidents asked Sodetani to force
Wong and Senate Ways and
Means Chairmen Mamoru Yama-
taki to turn over budget docu-
ments.

It was the first time in state
history that the Senate has been
used by its own members.

The six — Cayetano, Lehua
Zernades Sallling, Kawakazi,
Abercrombie, Takachi and Car-
penier — say they needed the
budget worksheets to make an
intelligent decision on the budget.

BUT SODE\TAN\I this morning
said the dissidents failed to show
how the budget worksheets quali-
ity as "public records."

"There is no evidence to indi-
cate that the worksheets are offi-
cial entries . . . or documents re-
ceived by the Senate Ways and
Means Committee or the Senate
for filing," Sodetani said.

He said the budget worksheets
are "preliminary internal working
papers" prepared by the staff of
the Senate's money committee
for use in legislative negotiations
and as such cannot be construed
as "official documents of the Sen-
ate."

Sodetani, in his oral ruling, re-
iterated that Cayetano was
wrong in arguing that the work-
sheets are important to under-
standing the budget bill, but "the
only issue is whether these docu-
ments are public records and
open to public inspection."

None of the six was allowed to
participate in the hearing.

THREE WEEKS AGO, the dis-
sidents tried to take over the Ways
and Means Committee but failed.
Wong punished the six by remov-
ing them as committee chairman
and from the budget talks.

The dissidents were joined in
their lawsuit by Common Cause/
Hawaii, the citizens lobbying
organization. Common Cause is
still contemplating another law-
suit against the Legislature, seek-
ing clarification about whether
the Legislature can bar the pub-
lic from strategy sessions on the
budget.

During yesterday's 90-minute
court hearing which was contin-
ued this morning, Dennis Goda,
deputy budget director, testified
that the budget worksheets are
"vital" parts of the budget be-
cause they help his office deter-
mine what the Legislature alloca-
ted for certain programs and
agencies.

Goda said the budgetary docu-
ments are prepared by the staff
of the Senate Finance and the
Ways and Means committees and
flush out the raw data in the
budget.

Cayetano, who represented the
dissidents in court, said the 150-
page budget is merely a summary
of numbers which are mean-
less without the worksheets.

BUT DON GELBER, attorney
for the state Senate, argued in
his memorandum that the work-
sheets are , not part of the budget
and have no legal authority. In
addition, the worksheets fail to
meet the criteria established for
public records under the state's
sunshine law because they are
not filed with any state agency.

Gelber said "common sense" as
well as the law dictate that the
court reject the dissidents' re-
quest.

But Cayetano this morning
argued that the only "public records" exempt from public dis-
losure are "those that invade the
right of privacy of an individual
or which directly pertain to
personal, or criminal litigation."
IRS Probers Sued Over Office Raids

THU JAN 13 1983 SB M

By Lee Coltercell
Star-Bulletin Writer

The operator of an alleged tax-shelter scheme sued federal tax investigators in federal court yesterday, charging that they violated his privacy in a raid conducted two years ago at his company's Waialae Avenue offices.

Henry F.K. Kersting, 60, of Kahala contends in the suit that Internal Revenue Service agents conducted three illegal searches at the offices before obtaining a warrant to conduct a fourth search, in which they "removed virtually every piece of paper." A federal grand jury never has indicted Kersting, but he has been involved in other court action since the January 1981 raid.

Federal Judge Martin Pence refused in June to stop a federal grand jury from investigating Kersting.

Earlier that month, the U.S. Tax Court threw out a tax-shelter plan he had devised, leaving some investors in a car-leasing plan devised by Kersting indebted to the Internal Revenue Service. Nine months earlier, he was forced to pay an airline pilot $22,500 for investments in a tax-saving plan.

IN THE lawsuit filed yesterday, Kersting contends that authorities "abused the grand jury process" by using it "to conduct a civil tax investigation" against him and his investors.

It maintains that the IRS has "targeted" Kersting and is "intent upon destroying" him and his companies because he is "an outspoken critic" of the tax agency.

One IRS agent "produced bogus identification on numerous occasions to Kersting" to obtain access to his records, the suit says.

In a 12-page affidavit prepared to obtain a warrant for the Jan. 22, 1981, search, authorities alleged that Kersting and his associates were marketing fraudulent interest deductions to reduce his clients' federal income tax deductions.

The affidavit alleged that Kersting generated fictitious deductions by creating loan transactions on Nevada corporations he controls.

Two Nevada companies — Atlas Funding Corp. and Delta Acceptance Corp. — were named along with Kersting as plaintiffs in the suit filed yesterday.
Attorneys for a former Honolulu policeman charged with invading the privacy of a man he was investigating gained access yesterday to the man's federal tax files to help the policeman's case in his trial in federal court.

Federal Judge Harold Fong allowed portions of the files to be admitted as evidence in the trial of James Nelson, 32, who is charged with a felony civil-rights violation for breaking into the apartment of Isaiah Reed in September 1981.

Reed was being investigated by Nelson and then-Internal Revenue Service Investigator Clark Halloran. Halloran has testified that they were trying to gain evidence that Reed was managing prostitutes.

The trial is scheduled to resume Monday and continue through at least late next week, unless Fong grants an unusual request by a juror to depart on a foreign trip on Wednesday and return Dec. 10.
Fong Denies He Violated Privacy Law

City Council member Hiram Fong Jr. said yesterday that his use of Council files for a political advertisement does not violate privacy laws because the Council's records pertaining to the Charter Commission selection process are not secret.

Fong was responding to a charge by his political opponent, Marilyn Bornhorst, that he had violated privacy-protection provisions in the City Charter and state law by publishing in campaign ads the names of two persons suggested by Bornhorst, but not chosen as Council appointees.

Bornhorst yesterday asked the city Ethics Commission to investigate Fong's use of two names contained in what she said was a confidential letter written last year by Councilman George Akehalana.

"I looked at the City Charter and I don't think it applies," Fong said. "First of all, if someone submits their name, that should be part of the public record."

FONG ALSO said he asked for and received permission from Council Chairman Rudy Pacarro to use the files to do research on the selection process for the 1982 Charter Commission.

Fong labeled the Ethics Commission charge as "a typical Bornhorst ploy."

"She made open, honest government an issue. If there is a meeting that's closed and if you're consistent with what you're saying, then you don't attend that closed meeting. She attended."

In an attempt to show that Bornhorst participated in the selection process, Fong used the names of Bornhorst's nominees in the first of a series of anti-Bornhorst campaign ads that appeared in Friday's newspapers.

Fong, a Republican, did not attend a Democrat-only "executive session" on April 1, 1981, at which the Council appointees were chosen, although he did submit a name for consideration.
Bornhorst Wants Fong Investigated

By Shu Glueberman
Star-Bulletin Writer

Marilyn Bornhorst today accused her City Council member opponent, Hirum Fong Jr., of violating privacy-protection provisions in the City Charter and state law by using confidential personal information in his political advertising.

Bornhorst said Fong, who faces her in the District 3 (Manoa-Waialae-Kahala) Council race, used the city Ethics Commission to investigate her opponent's use of names contained in a confidential letter taken from Council files.

Fong released the letter to reporters at a news conference Thursday and used the names of two persons nominated by Bornhorst, but not selected by the Council to serve on the city Ethics Commission in the March 15 primary of anti-Bornhorst campaign ads that appeared in Friday's daily newspapers.

Bornhorst said she submitted names after Council Chairman Rudy Pacheco invited her to attend a private executive session last year to investigate persons being considered for the Ethics Commission.

Fong said he did not attend the Democratic-only caucus, although he did submit a name for consideration at the April 1, 1981, meeting.

Bornhorst said the Ethics Commission that the names she submitted "were later given to Hirum Fong Jr. by members of the Council, or taken from Council records by Mr. Fong."

"It appears to me Mr. Fong and possibly other members of the Council have violated the charter and state law," she said in her complaint.

"They certainly invaded the privacy of public-spirited persons," she said.

At a news conference at her campaign headquarters today, Bornhorst denounced Fong's campaign tactics as "illegitimate" and "fraudulent," and challenged her Republican opponent to debate on such topics as development and environmental protection before next Tuesday's election.

"HE HAS CALLED me shameless, deceitful, and fraudulent," Bornhorst said.

"This is a tactic calculated to draw me into a name-calling contest with him. His objective is to turn an issue-oriented campaign into a smear campaign into a smear match to distract the voters," she said.

Bornhorst said Fong's tactic is "not serving a public purpose or contributing to good government. "Pure and simple, it's political politics and I won't have any part of it," she said.
Court Decisions
SAT OCT 2 1982 SB H
on Taping Crimes

Our two highest state courts have both split by hairline margins on a sensitive privacy question — but both, fortunately, have come down on the side the public sees as simple common sense.

The cases involved could be called “Little Abscam.”

In the most recent, a couple of police officers posing as “bad cops” accepted bribes to tip off massage parlor operators about coming raids, then arrested the alleged bribers.

To back themselves up, the police made audio or video recordings of the dealings.

“Never has there been any question that the police could testify about what the conversations were. But could they stand off the probable denials by producing tapes to back them up?”

Minorities on both the Supreme Court and Intermediate Court of Appeals have felt using the tapes violates the privacy clause of the state Constitution. They would have demanded a court warrant or the consent of all parties before making a recording.

In the most recent case, Chief Judge James Burns of the Intermediate Court stated the rationale for accepting the tapes: made by the police without warrants and without consent:

“Regardless of a defendant's actual or subjective expectations of privacy, society finds it unreasonable for him or her to expect that another party, who cannot legally be silenced by the defendant, would not repeat to others or could refuse to reveal in court the contents of a conversation with the defendant.

“A recording made with the participant's consent merely preserves the best and most reliable evidence of what occurred during the conversation and thus serves to enhance the truth-finding function of the court.”

The participant in the above reference is the officer.

Had neither participant consented to a recording then a warrant still would have been required for a third party to record it.

The decision is thus narrow, and we think eminently right.”
Appeals Court Issues Ruling

Videotaped Evidence Gets OK

by Pete Hom
Star-Bulletin Writer

Following the loss of the Hawaii Supreme Court, the state's Intermediate Court of Appeals ruled yesterday that tape-recorded and videotaped evidence does not violate a defendant's privacy.

Two members of the three-man appeals court adopted the high court's June ruling in the Donald Lester case but Associate Justice Harry Tanaka said the Lester ruling and a companion case "force my reluctant concurrence.

Tanaka said he agrees with the majority opinion in the Lester case that the recording of conversations with the consent of one party but without a warrant violates the privacy provision of the Hawaii Constitution.

The ruling, written by Chief Judge James Burns with Associate Justice Walter Hee in agreement, overrules a decision by Circuit Judge Simon Acoba involving two defendants in the massage parlor bribery case.

In June 1981, Acoba said he would not permit the recordings to be played in the trial of George T. Yamamoto and Roy T. Okubo because police did not obtain a warrant before making the recordings. He ruled that the recordings violated the defendant's privacy.

YAMAMOTO, A Board of Water Supply pipefitter, is charged with 16 counts of bribery and Okubo, a city fire captain, is charged with 17 counts of bribery.

They allegedly gave two Honolulu police officers money to tip them off about raids at massage parlors. The police officers were posing as "dirty cops" willing to accept bribes.

Yesterday's ruling eliminated the "lost obstacle" in the way of a trial for the two defendants, according to Deputy City Prosecutor Ed Kubo, who is handling the two bribery cases.

"You can't hide from right now," Kubo said after reading the decision.

He said the first bribery trial is already scheduled for next Thursday and that two other trials are scheduled for the following week. A trial for Okubo and Yamamoto is not yet scheduled.

"We're going to be pushing all the bribery cases now," Kubo said. "There is no legitimate reason for us to wait any longer.

He said the rationale of yesterday's ruling is identical to that of the plurality decision in the Lester case.

Kubo said he expected the defendants to appeal the ruling to the high court, which has new members since the Lester ruling in June.

BHUCE ITO, one of the attorneys for Okubo and Yamamoto, said yesterday he hadn't read the decision and did not know if he would seek review by the high court.

An appeal would give the high court a chance to modify or reaffirm the ruling in the Lester case, which was the product of a divided court.

The high court has the option of hearing the case or letting the appeals court ruling stand.

In the Lester case, Associate Justice Herman Lim and Associate Justice Thomas Ogata affirmed the murder-for-hire conviction of Donald Lester, who had challenged the use of evidence obtained when he spoke with a prosecution witness who recorded their conversation and obtained incriminating statements.

Associate Justice Benjamin Menor concurred with Lim and Ogata, but said he would have reversed the conviction if a third party was monitoring the conversation or if it occurred in a person's home or office.

Associate Justice Edward Nakamura and Chief Justice William S. Richardson said they would have reversed Lester's conviction based on the privacy provisions incorporated in the constitution after the 1978 Constitutional Convention.

Ogata and Menor have been replaced on the high court by Justices William Fujisaki and Yoshimi Hayashi.

BURNS WROTE in the Okubo-Yamamoto decision released yesterday that it is "an unreasonable expectation that what he says to an attorney will not be disclosed to someone else.

Therefore it is reasonable to expect that the recordings of what he said will remain private.

Regardless of a defendant's actual or subjective expectations of privacy, society finds it unreasonable for him or her to expect that another party, who cannot legally be silenced by the defendant, would not repeat to others or could refuse to reveal in court the contents of a conversation with the defendant.

A recording made with the participant's consent merely preserves the best and most reliable evidence of what occurred during the conversation and thus serves to enhance the truth-finding function of the court," the opinion said.

Consequently, a search warrant to record such conversations is not required, the court ruled.

The ruling also said the tapes did not violate Hawaii's wiretap law.

Tanaka's concurring opinion was based on the fact that "as a member of an inferior appellate court, the authority of the Lester case is binding on me.

Without the Lester ruling, Tanaka said, he would have dissented.

"I am convinced by and submerge the rationale of Justice Nakamura to his dissenting opinion in Lester," Tanaka wrote.

He said police have "ample opportunity" to obtain a warrant in the Okubo-Yamamoto case. He said the constitution requires a neutral and detached judge to make a determination that such monitoring is proper.
Nature of privacy at issue in appeal over police tapes

By Tom Kaser  
Adviser Staff Writer

When two people are having a conversation it is divested of its "private nature" if one of them is a police officer — so that the officer has the right to tape-record it for possible use in a criminal case?

Yes, said deputy prosecutor Edward Kubo Jr. yesterday before the Hawaii Intermediate Court of Appeals. He was appealing a decision last year by Circuit Judge Simeon Acoba that tape-recorded conversations with two men allegedly trying to bribe police violated the men's right to privacy.

Police say the two defendants tried to bribe two police officers in exchange for tips about future police raids on Superior Bath Systems, a massage parlor on Keeaumoku Street.

Acoha ordered that electronic surveillance of the conversations — both sound and videotape — be suppressed at their trial, which is pending while Acoha's decision is being appealed.

Kubo's main thrust for the state yesterday was that the defendants knew they were talking with police officers and that the officers' duty was to investigate crime. Therefore, Kubo maintained, the electronic surveillance was allowable under both the state Constitution and the state's "eavesdropping law."

Attorneys Gary T. Hayashi and Bruce Ito, representing the defendants, contended that their right to privacy was violated because the police did not obtain a warrant before the conversations were recorded. "There was an expectation of privacy here (by the defendants)," said Hayashi at yesterday's hearing.

Under questioning from Chief Appeals Judge James Burns, Hayashi conceded that it is permissible for a police officer to recall and write down details of a conversation. But the police officer cannot record the conversation itself (without a warrant) unless everyone involved in that conversation consents.

A key legal precedent in the appeal involves a murder defendant whose co-defendant, a woman, met him in a public park and recorded their conversation on a concealed tape recorder that she allowed police to strap to her body.

The man incriminated himself during the conversation and was subsequently convicted in a circuit court trial. His attorneys appealed to the state Supreme Court, claiming his right to privacy had been violated.

In an unusual split: decision handed down June 22, two justices of the Hawaii Supreme Court held that the recording was legal and that a transmitter would have been legal also. Two other justices dissented, holding that the state Constitution affords more privacy protection than the U.S. Constitution does, and that in their interpretation of the state Constitution the recording was a violation of the defendant's right to privacy.

The pivotal justice agreed the tapping was legal — but only because the conversation in this case took place outside, in a public place.
Checking Records of Welfare Recipients

Should the Social Security Administration try to find out if welfare recipients are cheating the government? Sure. Should it examine income tax records of recipients?

Some groups representing welfare recipients claim that such use of tax records violates privacy laws. But a federal judge has just rejected that argument.

The Social Security Administration had mailed forms to the four million recipients of the Supplemental Security Income program, requesting their consent to have Social Security officials check Internal Revenue Service records concerning them submitted by third parties. This refers particularly to forms supplied by banks and corporations to document income in the form of interest or dividends.

Such a waiver of privacy rights appears to be a legitimate requirement for beneficiaries of government programs. It represents a willingness to cooperate in assuring the integrity of the programs. The taxpayer does not want to help those who refuse to cooperate.
Judge Says

Some Tapes Admissible

FRI JUN 4 1982 SBN

By Pat Guy

Tape recordings of face-to-face and telephone conversations between a police officer and a woman charged with bribery do not violate her privacy and may be used at her trial, Circuit Judge Bertram Kanbara ruled today.

But Kanbara said audio and video recordings of conversations monitored by other police officers at the scene violate Kalima's privacy and cannot be used at her trial.

The decision clears the way for the prosecution to seek a trial date for Kalima, who was one of 11 persons charged last year with bribery of police officers.

In his 16-page written decision, Kanbara said there were four categories of conversations between Kalima and two officers who were posing as "dirt cops" willing to take bribes to tip off massage parlor operators about upcoming prostitution raids.

In the first category are face-to-face conversations that the police officer recorded with a tape recorder on his body. In the second category are telephone conversations between the officer and Kalima that were recorded by those officers. The third category involves face-to-face conversations recorded by the officer who also wore a transmitter that relayed the conversation to on-site police monitors. The fourth category involves video recordings of the encounters between Kalima and police during which the transmitters were used to record the conversations.

IN THE FIRST two categories, Kanbara said, the recording was merely an "accurate memorial" of the allowable, warrantless conversation between Kalima and the police officer.

He cited a U.S. Supreme Court decision which said that in the case of "direct evidence of a conversation which the officer is free to testify about in court.

The high court in that decision said the risk that a person took in speaking to someone about a bribe "involves the risk that the other" would be accurately reproduced in the court, whether by faultless memory or mechanical recording.

Kanbara said the same reasoning applied to the phone conversations between the defendant and the police.

In the two categories where third-party "monitoring is involved," Kanbara cited the Hawaii Constitution's right-to-privacy provisions. This "uninvited third party" or "monitor" with whom the defendant did not consent to speak invades her privacy and a warrant should be obtained before such recordings, Kanbara ruled.

The U.S. Supreme Court has allowed evidence obtained this way to be used in court, Kanbara said, but he said many state courts with or without privacy provisions have ruled otherwise.

Deputy City Prosecutor Ed Kuhio was not available for comment on how Kanbara's ruling will affect the Kalima case.

Already on appeal to the Hawaii Supreme Court is a ruling by Circuit Judge Simeon Acoba involving two other bribery defendants. The prosecution is appealing Acoba's ruling that both on-site and off-site monitoring of conversations violate a person's privacy, unless they obtain a warrant beforehand.
Acoba rules out hotel room tapes

By Ken Kobayashi
Adierver Staff Writer

Circuit Judge Simeon Acoba yesterday barred the use in court of video and audio recordings of a Honolulu psychiatrist accused of giving drugs illegally to an informer in a Waikiki hotel room last year.

Acoba ruled that the recordings, without court permission violated psychiatrist Pershing Lo’s rights to privacy.

Lo, 38, is charged with giving eight capsules of the drugs anobarbital and seconal to the informer who had set up the meeting at the Waikiki hotel room March 12, 1981, under the direction of state drug agents. The agents say they videotaped and recorded the meeting from an adjacent room.

Although Acoba ruled that the tapes could not be used as evidence, he did not bar the informer from testifying about the meeting and he did not go along with defense requests to dismiss the case or to exclude the drugs as evidence.

Deputy Prosecutor Tom Pico said he presumes his office will appeal the ruling. He said the prosecution probably will ask the Hawai‘i Supreme Court to consolidate the case with others dealing with similar issues.

Among them is an appeal of Acoba’s ruling last year throwing out recordings in the so-called massage parlor bribery case. Acoba ruled that the recordings violated the defendants’ privacy rights under the Hawai‘i Constitution.

Acoba’s 11-page written decision yesterday used some of the same reasoning as his earlier decision.

“All of the state supreme court decisions reviewed by this court have required a prior judicial warrant for electronic surveillance where a state constitution contains a guarantee of privacy in private communications or conduct,” Acoba said.

Acoba also ruled that Hawai‘i’s electronic surveillance law could be interpreted to prohibit the recordings. He said that under the law, all persons entitled to privacy in a private place must consent to the eavesdropping.

Lo, who is represented by attorney Wilfred Youth, has submitted an affidavit in the case saying he went to the hotel room to provide psychiatric treatment.

But according to the informant Charisse L. Sundberg’s testimony before the Oahu grand jury, Lo told her at the hotel room that he wasn’t going to give away the drugs. She said she asked him what he wanted, he replied: “Sex.”
Secrecy Criticized on Prison Report

SAT APR 3 1982 SBH

Why isn't the report of the Department of Social Services and Housing investigation into alleged prison brutality being released to the public?

Assistant Attorney General Michael Lilly told reporters that "the whole Privacy Act" required continued secrecy. As a lawyer, Lilly must have known that this claim is false! For one thing, the Privacy Act is a law covering federal agencies and only applies to state records under limited circumstances.

And even if the Privacy Act did apply in this case, it would actually require that the report be released to the public after individual names were blanked out.

Clearly, if Lilly is really concerned about privacy, this would be the proper course of action—delete the names and release the report. This would allow others, including the Legislature and the public, to evaluate the report's methodology and conclusions for themselves.

Anything less and the question remains—is there an official "cover-up" in progress?

The full report should be released now.

Ian Y. Lind
Psychiatrist in Drug Case Wants
Hotel Room Tapes Thrown Out

By Pot Guy
Star-Bulletin Writer

Honolulu psychiatrist Percival Y.S. Lo wants to have video and audio tapes of a hotel room meeting between him and a patient thrown out as evidence in the drug case pending against him.

Circuit Judge Simon Acoba heard arguments yesterday in the case and said he would rule later whether to allow or suppress the tapes as evidence.

Acoba also said he would not act on a request by Lo's attorney to view the tapes in a closed hearing until he decides whether he needs to see them to make his decision.

Honolulu Star-Bulletin attorney Christopher Dix told Acoba that the newspaper was opposed to a closed hearing and suggested that it was not necessary for the judge to view the tapes in order to make a decision.

He said Lo's request does not meet the standards for a closed hearing described in a Hawaii Supreme Court case.

Lo, 57, is charged with second-degree promotion of a dangerous drug for allegedly illegally dispensing a barbiturate to patient-turned-informant Charisse L. Sundberg March 12.

LO'S ATTORNEY, Wilfred Yulio, claims that the video and audio tapes of the meeting violate his client's privacy rights and that police should have obtained a search warrant before conducting surveillance.

Deputy City Prosecutor Wev Shea argued that a warrant is not required in cases where one party consents to the recording. He also said there were special circumstances which would have prevented the state narcotics agents from obtaining a warrant even if one were required.

Acoba has ruled in other cases that a person's privacy is violated when he or she is recorded in a place where they have a reasonable expectation of privacy.

John Madinger, an agent for the state narcotics control section, testified yesterday that Lo first came under suspicion the morning of March 12 when he obtained statements from Sundberg and her boyfriend, Lawrence Padilla, who were both patients of Lo's and were suspected of writing fake prescriptions for drugs on a prescription pad stolen from Lo.

Madinger said Sundberg and Padilla told him and other agents that they had received barbiturates from Lo "over a period of time" and that Lo gave drugs to Sundberg because he was attracted to her.

Lo would give Sundberg drugs when he "revealed portions of her anatomy" to him, Madinger testified.

HE SAID Sundberg told him that she did not receive any kind of medical examination from Lo before getting the drugs.

She also told the agents that Lo once came to the Kaniu Plaza apartment she shared with Padilla and they all took some barbiturates and smoked marijuana, Madinger testified.

Sundberg agreed to cooperate with the agents on March 12 and called Lo that afternoon, according to court documents.

She told him she had broken up with Padilla and urgently wanted him to come to her room at the Park Shores Hotel and bring some medication.

The agents set up surveillance equipment in an adjoining room and monitored Sundberg's meeting with Lo after her arrival at 7:15 p.m.

Sundberg testified to the Oahu Grand Jury in June that Lo said he didn't want to give her the drugs free any more, that he wanted sex. Sundberg, according to the grand jury transcript, took a vial of eight pills from Lo.

Agent Robert Au then entered the room, posing as Sundberg's "business manager," and took the pills from Sundberg, according to court records.

According to the court file in the case, neither Sundberg nor Padilla has been charged with writing the false prescriptions.
Disclosure Act Proposals
THU OCT 15 1981 SBH
Even Confuse the Agents

By W. Dale Nelson

WASHINGTON (AP) — The Reagan administration proposed new restrictions on the Freedom of Information Act today but confusion developed over its position on the Central Intelligence Agency’s request for exemptions from the act.

"In administration takes no position with regard to that subject," Jonathan C. Rose, assistant attorney general for legal policy, said in response to a question by Sen. Orrin Hatch, R-Utah, about the act’s applicability to the CIA.

But later, after Rose’s appearance before the Senate Judiciary subcommittee on the Constitution, Justice Department spokesman Mark Sheehan said the administration does believe the CIA should be exempt from the act.

Sheehan said, though, that the administration wants the matter handled in legislation separate from the proposed amendments Rose outlined for the committee at a hearing.

Rose had said he was "personally sympathetic" to CIA director William J. Casey’s arguments that the agency’s work is impeded by the disclosure law. But, Rose told a committee on Monday that the White House has taken the view that we are not going to deal with that situation now.

ROSE ALSO TOLD the committee that he personally thought Casey and Bobby Ray Inman, deputy director of the CIA, had made a "very provocative case" in raising "the fundamental question of whether it makes sense to have this statute apply to the agency at all."

After the testimony, Gary Chase of the CIA general counsel’s office followed Rose into the hallway and told him that he had understood the administration was going to take a position. Rose replied that the White House had said it would not.

Chase, asked about the conversation, said, "There seems to be a little bit of confusion within the administration as to what the situation is."

Rose, also asked about it, confirmed that his testimony reflected the position taken by the White House.

ROSE TESTIFIED that the administration’s proposed amendments to the act would "strengthen the protection given to information where disclosure would result in an unwarranted invasion of personal privacy, harm the public interest in law enforcement, injure the legitimate interests of private parties who have submitted proprietary information to the government, or impede the effective collection of intelligence."

He said they would also prevent parties in lawsuits from using the Freedom of Information Act to get around the court rules governing access to the other side’s information.

The proposals would speed up the processing of requests from the news media and others while at the same time "establishing realistic time requirements for agencies to respond to requests and decide appeals," he said.
‘Paper Trail’ Could Help Track Down a Proposed Project

By Sterling Martin
Star-Bulletin Writer

THERE are many things in publishing that people would like to know. The problem is that many people don’t get the information — either because of a lack of time or unwillingness to pursue the matter.

But what probably stirs a person or community group the most is to start thinking about public records and about what information an individual can find in them. In a large housing project proposed for construction in the neighborhood.

When a developer wants a change in land-use classification, he must file a detailed application with the state Land Use Commission (Room 1755 at the Pacific Trade Center). From this application, one can learn the size of the project, its location, the terrain, available services, possible environmental impact, and other information.

If a zoning change or permit request is involved in a development, the application is filed with the planning offices of the various counties. In Honolulu, the Department of Land Utilization is in the Honolulu Municipal Office Building, 515 S. King St., processes permits and requests for information.

The applications also contain the names of the landowner and developer, or their agent.

In finding out information about a project, one should first check the corporation developing it or the firm that owns the land on which it is to be built. Go to the business registration division of the state Department of Regulatory Agencies on the first floor of the Kamalama Building, 100 Richards St., to find the articles of incorporation of the company and its original stockholders. One also should peruse recent annual reports, which list current officers of the corporation, but the exhibits do not require disclosure of current stockholders.

First floor is the Kamalama Building. People must serve themselves in the Bureau of Conveyances, which is a five-dollars long gives the book number and the second number, after the flash, gives the page to look up. In Land Court, ask the clerk behind the counter to get the documents for you.

The deed will have the parties to the transaction and sometimes the value of the property changing hands which, if not disclosed to the deed, might be in a mortgage the record follows the deed. If the price is not revealed, the conveyance (usually) can be multiplied by $2.50 to figure out the value. The $2.50 figure is calculated from the conveyance tax rate of 3 cents to every $100 of the value of the property. This does not work in cases where penalties or assessments are added to the conveyance tax because of late filing of documents. A world of warning in that in the 1960s, the state used a different taxing formula, identified by the letters "BS." A tax official can tell you how to compute the value of the transaction under the RS system. Conveyance taxes are assessed by the letters "CT." White at the bureau or Land Court, one can also check the names of corporations that have those names on conveyances. If you have a conveyance tax figure, you can verify if the conveyance is reflected in the tax records. If it is not, you can check the tax records at the State Tax Commission.

A number of years, while Land Court records have only been cross-indexed since 1976.

WHEN CHECKING the documents, look for clues. For example, if you find a large amount of loans outstanding for the company, or a record showing that the company does not pay its taxes, it is an indication of financial instability. There may even be a number of mortgages on the same land parcel, which also can be an indication of financial difficulties.

THE NEXT THING to check is the land ownership history which is contained in tax records now with the county governments. In Honolulu, the real property tax assessment office, where Oahu property books are, is located on the second floor of the Model Progress Building, 1st Fort Street Mall. Information about property for the Neighbor Islands is kept on the fourth floor of the same building.

There one will find tax field books which list numerous parcels of land by tax maps key. The zoning or land-use change applications will give tax map keys, which once looked up. If the field books will last ownership for a number of years, including conveyance taxes is in form of tax that generally discounts the amount of money the land was sold for and where the deeds are located.

One might want to scan several years of transactions on the land to see if there are patterns of speculation just before the filing of the application or a number of transactions among the same group of people.

One also might want to check ownership of land adherent to the parcel being developed. City zoning records at the Department of Land Utilization or City Council for the abutting properties might yield information that they also are zoned for high-density residential or other high-density use.

When reviewing the list of landowners, one probably will find additional corporations or partnerships. This may highlight the extent to which the land is being divided and given their comments, and as the application works through the bureaucracy, additional information is added to the application form. Too many agencies might provide helpful information if there is a question of adequate water in the area, the Honolulu Board of Water Supply keeps data on water usage in certain areas of Oahu and whether the water pipes in the area can carry enough water to serve new developments.

The work may take quite a while and may not yield anything, but at least it might provide you with adequate information or background.

If the transactions are complex, be prepared to go back to the various agencies to start the process all over again.
For example, the corporation's owner of the office and the local division of the Children's Bureau is responsible for the health and safety of the children in the community. The Children's Bureau is in charge of enforcing the rules and regulations for the safety of the children, and it is supported by the local government.

In December 1972, the Children's Bureau, through its Social Security Administration, issued a report on the effects of welfare on the health of children. This report was published in the Federal Register and was widely distributed.

The report states that the effects of welfare on the health of children are significant and that the program is successful in improving the health of children. The report also states that the program has improved the health of children in poor neighborhoods.

The report concludes that the program is a success and that it should be expanded to other areas.

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The Public Right to Know vs. Privacy

Balancing Act a Tough Task for State

In Conflict over Providing Information

By Stringer Barnes

Although three years ago, a group of employees questioned whether a policy of the state Department of Environmental Control was in violation of the state constitution, the issue has been delayed by the Supreme Court of Iowa.

In 1975, the group expressed a concern about the legal ramifications of a decision to classify certain records as confidential. The Iowa Supreme Court ruled that the state Constitution prohibits the city government from making information available to the public.

However, in a 1979 case, the court held that the state Constitution does not prohibit the city government from making the records available to the public.

Although there have been no major changes in the laws since the 1975 case, the court has not ruled on the issue.

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Public Finds Path to Records Often Blocked.
Information—Public Right to Know vs. Privacy.

Citizens Find Government Restrictions Make Records Access More Difficult

Continued from Page One

Editor—Page A-20

Editorial—Page A-20
Tips on Getting That Information

By Sterling Marks

The Freedom of Information Act, a Service Center in Washington, D.C., has published guidelines on how to use the Federal Freedom of Information Act and on what general types of records cannot be released under the statute.

The act is a federal law that allows the public to request access to government records and files. The act applies to all federal agencies and departments and is designed to increase the transparency and accountability of government operations.

To request information under the Freedom of Information Act, you must file a written request with the agency or department that has the information you are seeking. The request should be specific and identify the records you are seeking as much as possible. If your request is denied or partially denied, you may appeal the decision to a higher level of the agency or to a court of law.

The Freedom of Information Act also requires that agencies provide a copy of the records you are seeking to you within a reasonable time frame. In some cases, the agency may charge you a fee for copying and mailing the records. The fee is intended to offset the cost of copying and mailing the records.

Tips on Getting That Information

1. Check the agency's website for a Freedom of Information Act request form. Many agencies provide a form on their website that you can fill out and submit.
2. If you do not have access to the agency's website, you can request the form in writing. You may request the Freedom of Information Act request form by writing to the agency or department that has the information you are seeking.
3. Fill out the request form completely and submit it to the agency or department. Be specific in your request and provide as much information as possible about the records you are seeking.
4. Follow up on your request if you do not receive a response within a reasonable amount of time.

What Is Public, and What Is Not

The public deals with government considerations every day, and government keeps records of it. Here is a list of such documents that are open or closed to the general public:

- Birth, death, and marriage records are open to the public.
- Court records are open to the public.
- Tax records are open to the public.
- Social Security records are open to the public.
- Voter registration records are open to the public.
- Criminal records are open to the public.

Applications for drivers' licenses are open to the public.

Criminal records of individuals are closed to the public, and federal law makes it a crime for a law enforcement official to release criminal records to anyone.

The names of registered voters are closed to the public, and federal law makes it a crime for a law enforcement official to release the names of registered voters to anyone.

Accounts information, listed in the public, although information is released to the public, is involved in a misused and their social security numbers are released to the news media.

Please provide me copies of all records about you if I can assist in your search. I am providing you the following additional information about myself. Then, that whenever additional personal data you don't mind revealing to the agency, if you have used, Social Security number, date of birth, and place of residence, foreign travel, government, and bank accounts.

If you determine that any personal data you have used, Social Security number, date of birth, and place of residence, foreign travel, government, and bank accounts.

I overcome any legal barriers to obtain a copy of this request, please contact me by telephone, and if you need assistance, I will look forward to receiving a prompt reply.

Very truly yours,

Your signature

Application for drivers' license

Applications for drivers' licenses are open to the public, and federal law makes it a crime for a law enforcement official to release criminal records to anyone.

Criminal records of individuals are closed to the public, and federal law makes it a crime for a law enforcement official to release criminal records to anyone.
Types of Records
Open for Perusal

By Stirling Marita
Star-Bulletin Writer

The state government has no comprehensive list that says what is and what is not public record. To get an idea of what records are in the public domain, one has to comb the statute books searching to say whether a certain type of government report is public or confidential. The following, although not comprehensive, lists the kinds of state government records either closed by law or deemed confidential by the attorney general's office.

GENERAL GOVERNMENT
-Applications for licenses covering such topics as real estate sales, vocational schools and other professions regulated by government.
-Applications for permits to sell or buy real estate, including all vessels, agriculture and business licenses.
-Records of persons who receive unemployment compensation.
-Records of business, labor and industrial relations.
-Names of claimants and witnesses of possible irregularities involving boilers, elevators and amusement rides.
-Information collected by the Department of Labor when it is regarded as a trade secret.
-Identities of witnesses to industrial accidents and information from the witnesses to state Occupational Health and Safety office.

REGULATED BUSINESSES
-Bank examiner information, except for formal actions taken by the Department of Regulatory Affairs.
-Insurance company rating agencies reports, policies and other documents filed with the insurance division of the Department of Regulatory Agencies.
-Insurance information on a loan involving an insurance policy, unless the individual involved authorizes the release.
-Credit union information from a state review board.
-Information from the board governing the Industrial Loan Company Guaranty Act, which insures industrial loan company deposits up to $10,000, when the information is passed on by the state bank examiner.

ETHICS
-Ethics Commission procedures and records unless the violation is blatant, and the commission feels it should identify the person who is the target of the complaint.
-Financial disclosure statements of trustees of the Office of Hawaiian Affairs and of state administrators below the rank of first deputy department head or any other elected official and state office for assistance.

HEALTH
-Birth, death and marriage certificates filed with the Department of Health. However, genealogists and persons working for real estate title companies have limited access to the records. Of course, persons directly involved or their agents may receive copies of their certificates.
-Health surveillance reports to the Department of Health and cancer information that reveals data identifying an individual.
-Records of mental patients cared for by the Department of Health.

LABOR
-Lists and files of persons who receive unemployment compensation.
-Records of persons receiving unemployment compensation.
-Records of business, labor and industrial relations.
-Names of claimants and witnesses of possible irregularities involving boilers, elevators and amusement rides.
-Information collected by the Department of Labor when it is regarded as a trade secret.
-Identities of witnesses to industrial accidents and information from the witnesses to the state Occupational Health and Safety office.

STATE law does not provide procedures that can be followed by persons who want access to their public records. But here are a few suggestions.

State statute requires that public records be made available to persons during regular working hours and does not specify any additional time.

If you are interested in a certain type of record, you might try the Department of Labor if it is regarded as a trade secret.
-Identities of witnesses to industrial accidents and information from the witnesses to the state Occupational Health and Safety office.

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A Few Suggestions on Obtaining Data

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Public Records for the Public

With all the paper government generates, one might think public servants were doing more than their share at all levels — federal, state and local — to keep taxpayers well-informed.

But it doesn't always work that way. Much of the time, agencies of the government issue reports, announcements and press releases that seem almost to bury us in a lava flow of data we don't need. When we really want to find out something specific that involves action by government, we can often expect a hassle with a counter clerk whose basic position is it's none of our business.

In recent years we in the news media have found what appears to be an overdeveloped concern for privacy clashing with the concept we refer to with some constitutional authority as "the public's right to know." "

Lawyers and judges have sought to close parts of the courtroom trial process to the public. Record keepers have decided to limit access to information, often for reasons having as much to do with their own convenience as anything else. Departments have refused to release salaries of public officials. "National security" has been invoked on occasion to prevent the public from learning about the mistakes and failures of government.

We also detect a growing use of bureaucratic duplicity in the form of procedural "humbugs" that effectively discourage members of the public from exercising their rights to inspect records of vital statistics, property ownership, land sales, tax assessments, business transactions, loans and liens, building plans, auto accidents, voter registration, court files, campaign contributions, corporate officers and other public facts.

Today the Star-Bulletin begins a series of articles by Stirling Morita on sources of public information in Hawaii. Morita, who in his 4¼ years with the Star-Bulletin has been involved steadily in efforts to keep government open, points out that "subtle pressures" are at work to isolate the public from information it is legally entitled to have.

To those who believe our society depends on a free flow of information about actions of government agencies affecting everyday life, the Morita series should be disturbing.

It also promises to be a controversial series for those who feel the news media already intrude too deeply into individual lives.

And for those seeking a sensible way to balance the right of free public inquiry with the growing desire for personal privacy, the Morita series should help to sort out which areas of information are public, which are private and which areas have turned fuzzy gray through a confusion of policies.

We hope the series helps set the record straight on what information still belongs to the taxpayers and how they can find it.
City prosecutor's office shocked

Judge rejects bribe tapes

THU JUN 1 1981

By Ken Kobayashi

The city prosecutor's office was dealt a setback yesterday with what it says is a severe loss in its prosecution of two major defendants in the massage parlor bribery cases.

Circuit Judge Simeon Acoba ruled that the prosecutors cannot use the recordings and videotapes of the defendants and police officers for the trial scheduled to start tomorrow.

But because of the ruling, Deputy Prosecutor Edward Kubo Jr. said his office will refuse to go to trial and instead appeal the decision to the Hawaii Supreme Court, even if Acoba orders them to proceed with the case.

"Our office is totally shocked," Kubo said. "We're outraged by the decision. We feel that it is totally contrary to the law of Hawaii and that's why we have decided to appeal the ruling at this point."

Kubo said the ruling "considerably weakens the prosecution's case. He also said if the prosecutor's case is tossed, they won't be able to try the two defendants again because of the prejudice against double jeopardy — being tried twice for the same crime.

The two defendants are Roy T. Okubo, 39, a Honolulu fire captain, and George T. Yamamoto, 39, a pipefitter with the city Board of Water Supply. The two were among 13 defendants indicted in January on charges of bribing police officers posing as crooked cops.

Okubo, indicted on eight counts, and Yamamoto, charged with 19 counts, are accused of paying a total of $3,250 in cash and about $100 worth of aloha shirts to the officers in exchange for information about future police raids at Superior Bath Systems, a Keeaumoku Street establishment.

which the prosecution says has been engaged in prostitution.

The prosecution's case is based on phone conversations and meetings the two men had with police officers. The prosecution had planned to introduce the recordings and the tapes of those meetings at the non-jury trial tomorrow before Acoba.

Acoba, however, ruled that the taping of those conversations and meetings — which had been done without a warrant signed by a judge — violated the defendants' rights to privacy protected under the Hawaii Constitution.

He ruled the defendants had a "reasonable" expectation that their conversations with those officers would be kept private.

The judge cited the Hawaii Constitution's counterpart to the U.S. Constitution's Fourth Amendment against unreasonable searches and seizures. In effect, Acoba interpreted the Hawaii Constitution more broadly than federal judges have interpreted the U.S. Constitution's Fourth Amendment.

Tapes of conversations and meetings are admissible in federal court so long as one party consents. In effect, Acoba interpreted the Hawaii Constitution as barring such tappings.

He said the Hawaii provision is aimed at protecting the "ability of people to communicate without fear of the risk that their conversation will be reported without their consent."

Acoba said that if the consent of only one party is adequate, it would "do away with the warrant requirement" and a person's rights to privacy as protected by the Hawaii Constitution would be "meaningless."

Acoba said he realizes that the Honolulu Police Department put considerable effort in the case, but he said the amount of effort does not "justify" the violation to the defendants' rights to privacy.

Acoba's ruling does not prevent the police officers from testifying about the conversations, but Deputy Prosecutor Kubo said it now will be the policemen's word against the defendants' word.

Kubo also said the ruling sets a "dangerous precedent" because it gives the other bribery defendants an opportunity to eke out a ruling and ask for similar decisions. The next cases are scheduled to go to trial June 29 before Circuit Judge Bertram Kanbara.

Acoba is not handling any of the other bribery cases. He was given the Okubo and Yamamoto case because Kanbara is presiding over a murder trial.

Earlier in the day, the prosecutor's office asked Acoba to disqualify himself from the case. The motion was based on an affidavit by Honolulu Prosecutor Charles Marsland, who pointed out that James Koshiba, attorney for the defendants, was the chairman of the state's Judicial Selection Commission, which submitted Acoba's name to Gov. George Ariyoshi for an appointment to the circuit bench.

Acoba indicated that Marsland's affidavit was not made in "good faith." Acoba said the case had been pending for several months before Judge Kanbara, whose name also had been submitted to Gov. Ariyoshi by the commission that Koshiba chaired.

Acoba pointed out that the prosecutor's office did not make a similar objection to Kanbara when he presided over the bribery case.

Acoba has been criticized previously by prosecutors for his decision last year overturning a circuit court jury's murder conviction of Lance Hashizume for the shooting of his Palolo neighbor in 1978. Acoba acquitted Hashizume by reason of insanity and committed him to the state hospital.
Suit, countersuit in bugging accusation

By Charles Turner

Adviser Labor Writer

Charges of illegal electronic bugging of the Hawaiian Carpenters' union's leadership have led to a $1 million suit against Maui contractor Walter Munogian, who counter-sued with a $1.5 million claim of his own.

The two suits were filed this month in Circuit Court.

Walter M. Kupau, union financial secretary, brought the first suit, claiming that Munogian, who heads C & W Construction Co., taped a telephone conversation on Feb. 22 after allegedly telling Kupau "their conversation would be private and confidential..."

Kupau also claimed that Munogian disclosed the contents of the tape to Honolulu attorney Barry Harr, who in turn disclosed it to the National Labor Relations Board, where unfair labor practice charges were filed against the union.

It also was alleged that Munogian recorded a "face-to-face conversation" with union business agent Ralph Torres despite assurances that their talk would be confidential.

The suit against Munogian also named Harr and his law firm as defendants, conceding they violated the constitutional rights to privacy of Kupau and Torres.

Union attorney Dennis Chang, who filed the suit, said he believed it was the first civil suit case involving electronic eavesdropping.

The law was amended and strengthened in 1978.

Circuit Judge Simeon Acoba, in a criminal case involving the same law, earlier this month threw out video and audio tapes made in bugging charges involving a Honolulu fire captain and a city employee on grounds the tapes invaded their privacy rights.

Marr and the law firm of Torkildson, Katz, Jossen & Loden denied any wrongdoing in the Maui contracting case and said Kupau never was given any assurance that any communication made by him would be confidential... or withhold from governmental authorities.

Munogian's countersuit accused Kupau of "retaliation" against the Maui contractor because he resisted the union's efforts to make him sign a contract.

He said the union contacted him in December 1979 and accused him of having "substandard wages, hours and working conditions" in his contracting operations.

Munogian denied the allegations and said he went to the Honolulu law firm because the Carpenters were trying to force him to sign a union contract. Charges are pending in federal court, he said, in his countersuit, filed by attorney Jan Weinstein.

Munogian accused Kupau of causing him "severe emotional distress, loss of business income and loss of earnings."
Judge Allows Taped Dialogue as Evidence

By Pat Guy
Star-Bulletin Writer

Circuit Judge Richard Au yesterday ruled that recorded conversations can be used as evidence in criminal cases, his decision is contrary to a ruling handed down earlier that month by Circuit Judge Sam-e on Acoba Jr.

Au yesterday denied a motion to suppress recordings of conversations between undercover narcotics officer and Raymond R. Galaza Jr., Galaza, a policeman himself, who has been suspended since his arrest, is charged with two counts of promoting dangerous drugs by selling cocaine and methaqualone to an undercover officer last November.

Au ruled that recordings made by undercover officer Joanne Takasato can be used as evidence against Galaza and did not violate his right to privacy. Au ruled that a warrant was not required because Takasato consented to the recordings and consent of one party is all that the law requires.

On June 10, Acoba ruled that recordings and videotapes between police officers and two defendants charged with bribery cannot be used as evidence. He ruled that the recordings violated the defendants' privacy rights as guaranteed in the state Constitution.

ACOBA SAID FEDERAL COURTS

have ruled such recordings admissible when one party consents, but said the state Constitution has broader privacy protections and broader restrictions against unreasonable searches and seizures. He is preparing a written decision.

The city prosecutor's office, which was out of court at Acoba's decision and intends to appeal it, was pleased with Au's ruling.

City Deputy Prosecutor Ed Kubo, who handled the bribery case before Acoba and was in court yesterday to hear Au's ruling, said after the hearing that he believes the split in the Circuit Court may result in the Hawaii Supreme Court hearing an appeal—once it is filed—sooner because there's a "more-compelling need now.

Peter Wolff, who represents Galaza, argued that Galaza reasonably expected that his conversations would be private. He cited Acoba's decision in his argument and said that decision "points the way this court should resolve this issue.

City Deputy Prosecutor Tam Pico, who opposed Galaza's motion, argued to Au that a person does not have an expectation of privacy when he is discussing criminal activity with a government agent.

Au ALRED SAID the most-recent (1978) amendment to the state Constitution regarding the right to privacy does not cover situations such as Galaza's, but involves "highly personal and intimate information" in government hands, such as information about contraception and birth control.

Pico also said 27 other states had ruled that recorded conversations were admissible in court.

Au said he agreed with Pico's interpretation of the 1978 privacy amendment and added that he believes its wording means the Legislature has to take action to implement the amendment through statute.

As said the constitutional guarantees against unreasonable searches and seizures offer no protection "to a wrongdoing police officer's misplaced belief" that criminal activity he discusses will not be recorded.

He said the "overwhelming weight of authority" was to allow recordings with one-party consent.

Galaza, 26, is scheduled to stand trial on the charges in October.
City Attorney Examines
Issue of Public Access

By June Watanabe
Star-Bulletin Writer

Are building permit plans and applications a matter of public record?
The answer to that question may prove to be crucial as more and more persons begin to challenge building permits issued by the city.

City deputy corporation counsel Steve Lim says the present standard — based upon state law, an attorney general's opinion and the city managing director's rules and regulations — all point to a "no" answer. That holds for any application for a permit or license before it is issued, he said.

Lim had been assigned to review the issue after a dispute about the Bell Air Plaza condominium project in Makiki.

The Makiki Community Association is fighting the 70-foot project, arguing that the 45-foot height limit established for the area should apply to the development.

Lim also noted a Circuit Court civil case involving the Paua-Pacific Heights Community Group in which the judge "held that building permit plans and applications were public records."

In that case, the association challenged the city's issuance of a building permit to Rainalter Holdings Land Corp., which wants to build a 51-unit condominium building in Paua.

In January 1980, Circuit Judge Arthur Fong ordered the city Building Department to allow the plaintiffs to review "the building applications, building plans, specifications, supporting documents and inter- and intra-office memoranda, reports and recommendations."

Lim said: "My question will deal with whether or not building permit applications and plans (including drawings) are public record pursuant to the Hawaii Revised Statutes, Section 23-30."

An attorney general's interpretation of that section held that "applications for licenses" are not a matter of public record.

Lim said there are many things to consider in the case, including confidentiality and "trade secret" problems.

When the Building Department receives applications for permits, staff members routinely give out basic information upon request, such as the type of project being proposed, how large it is and who the developer is, Lim said.

But, "the people really into (finding out about certain projects) want to examine plans more in-depth, to check the requirements for such things as sewer and water before the department acts on the application," Lim said.
Bill for open reports
goes to another panel

By Sandra S. Osiade
Adverser Government Bureau

A Senate-passed bill aimed at ensuring that legislative committee reports are open to the public moved out of one House committee last week and is headed for the Judiciary Committee.

Some members of the House Public Employment and Government Operations Committee approved the measure with reservations, saying they were not sure if the bill's provisions would mean greater public access to legislative decisions.

The Senate bill, pushed by a coalition of civic groups, suggests a number of changes in the state’s open meetings and open records law, including one provision touching on committee reports.

Committee reports reflect a legislative committee's thoughts and recommendations on particular measures. They bear the signatures of committee members and indicate if members agree, "agree with reservations" or "disagree" with the attached bill or resolution.

The sunshine bill would define the reports as public records and make them open to public inspection when it becomes apparent from committee members' signatures whether a measure has been approved or rejected.

The provision seeks to address a problem raised in 1980, when Senate leaders denied a request from an Adverser reporter to see a committee report on a controversial condominium conversion bill. The bill was killed by the committee, but it was not really apparent who voted against it without access to the report.

Common Curs/Hawaii, the citizens' lobbying group, 'subsequently went to court to have the report released. The matter was declared moast by the court when committee members signed affidavits indicating how they signed off on the report.

In moving the bill out of his committee this year, Rep. Anthony Takitani said he's not sure if the measure will have the effect of opening up the legislative process as supporters hope.

"In practice it might close it," Takitani said. He said some committee chairmen may not circulate committee reports at all unless they are sure the attached measures will be approved.

This happens now. Takitani agreed, but the bill, if approved, might "suggest even more" that committee reports not be circulated unless a chairman is sure the attached bill will be moved out.

If a report is not circulated, a chairman might spare individual committee members any negative public reaction to a pre-determined decision by the committee to kill a bill. On the other hand, if a report is circulated and a bill killed for lack of agreement, the signatures would be made public.
Including Committee Reports

Panel Calls for More Sunshine

By Helen Altonn
Star-Bulletin Writer

Greater public access to government actions and records — including those of the Legislature — would be provided under a Senate bill approved yesterday by the state House Committee on Public Employment and Government Operations.

But while they supported the measure, some members of the House committee said they fear more back-room decisions will result from a requirement to make all legislative committee reports on bills public.

"I think this amendment does more harm than good for those requesting it," said Committee Chairman Anthony Taktani, D-6th Dist. (West Maui-Molokai-Lanai).

"It could make it a hell of a lot harder," said Rep. Whitney Anderson, R-25th Dist. (Aikahi-Enchanted Lake), who agreed that a committee's actions "could be more hidden if a chairman wants it to be that way."

But despite their concerns, committee members said legislators should answer to the public, whether they are for or against a bill so they decided to keep the provisions dealing with legislative committee reports.

Committee reports were not disclosed on two controversial bills during recent legislative sessions.

One concerned gay rights in the House two years ago and another dealt with the conversion of rental units into condominiums in the Senate last year.

The Senate this year included a provision in its rules to make committee reports public documents. Some House members asked for a similar rule, but House leaders said they felt it wasn't necessary because House committee reports are open to public scrutiny.

The bill strengthening the state Sunshine Law, which now goes to the House Judiciary Committee for review, also would:

— Require a two-thirds vote of all members of state boards to close a meeting to the public instead of a two-thirds vote only of those present. Each member's vote and the reason for closing the meeting would have to be announced publicly.

— Require public notice of all meetings, including those closed to the public, and the purpose for them.

— Prohibit a board from making any decision or "deliberating toward a decision" during an executive session, which the state attorney general said is "overly broad" because "virtually any discussion in an executive session may be considered deliberation toward a decision."

— Require the attorney general and prosecuting attorney to investigate residents' complaints about violations of the Sunshine Law and allow citizens to file suits. The bill also provides for court-ordered payment of attorneys fees and court costs to defendants.

He said public records should be accessible to citizens now without having to give reasons, although media groups said persons often are intimidated or deterred from examining records.

SAT MAR 28 1981 SB H
Committee Studies Disclosure Change

By Bruce Dunford
Associated Press Writer

A state Senate bill that opponents say would, in effect, repeal a state law requiring public disclosure of outside financial interests held by top state officials and lawmakers is awaiting a decision by the Senate Judiciary Committee.

Katherine Chang, state Ethics Commission's acting executive director, told the committee at a Thursday hearing that the bill would get around the intent of the 1978 state constitutional amendment for financial disclosure.

Under the existing law, all financial interests of state officials and candidates for public office have to be filed with the state Ethics Commission on an annual basis.

The proposed change introduced by Sen. Clifford Uwaine would no longer require disclosure of financial interests that "...are not directly affecting any of the person's official actions or duties" and would not be considered a conflict of interest.

THE WAY THE proposed bill is written, according to Chang, the official involved would be the one deciding whether his outside financial interests constitute a conflict of interest.

The Ethics Commission feels the decision on whether a financial interest is in conflict with an official's duties should be decided by an objective body such as the commission, not the official involved, she said.

Uwaine's bill says a Right to Privacy amendment in the state constitution indicates that state officials and legislators should only have to disclose "truly relevant financial information."

The Right to Privacy amendment and the financial disclosure amendment were both passed by the same constitutional convention and the delegates probably did not intend one to usurp the other, Chang said.

Without an overall disclosure of financial interests, the very essence of the disclosure law is lost, she said.
Privacy and names

The conflict between privacy and access to information and public records may be the battle ground for press freedom in the coming year.

In an effort to protect the privacy of the individual, 24 states have passed laws in the last two years restricting access by the public and the press to official records of arrests, indictments, trials, acquittals, convictions and sentences. Such restrictions are now in effect in 47 states, the District of Columbia and Puerto Rico. Only the Dakotas and Vermont have no laws of this nature.

Some of these statutes not only permit records to be sealed from public scrutiny but they allow the records to be destroyed. This is frequently applied in the 27 states which allow records of juvenile offenders to be either sealed or expunged.

The publication of names of offenders have been withheld in the past when police have refused to disclose the names of arrested persons even to their own relatives.

The application of these laws sometimes approaches the level of idiocy.

In Washington, D.C., officials of the FBI refused to reveal the criminal arrest record of the accused killer of Dr. Michael Halberstam because it might infringe on his right to privacy even though the bureau had issued 13,000 wanted circulars on the man.

In South Carolina, five newspapers were found in violation of a statute for publishing the name of a 12-year-old suspect implicated in the murder of his eight-year-old cousin even though, as one editor pointed out, the sheriff had revealed the name at a press conference and the names of suspect and victim already were common knowledge in the community.

It may not be possible to roll back the clock on such legislation, even if that were desirable. But certainly it is possible to obtain some sensible interpretation for the application of the statutes to protect the rights of others as well as of the individual.
Media panel drops effort to name police investigated for misconduct

By Sandra S. Oshiro  
Statehouse Government Bureau

The Honolulu Community Media Council last week dropped its effort to require disclosure of the names of Honolulu police officers under investigation for alleged misconduct until more study is done on the issue.

Chairman Robert Fiske said the council took the action after receiving a state deputy attorney general’s opinion that such information is confidential.

Council members first initiated their challenge in 1979, when the Honolulu Police Commission decided to withhold the names of officers accused of violating the city’s code of ethics.

Fiske said the council will take a hard look at the structure of the Police Commission and its relationship with the Honolulu Police Department with an eye to proposing City Charter changes next year.

Concern had been voiced about the commission’s lack of enforcement powers as well as its policy on open meetings.

The commission, which investigates each complaint but refers those upheld to Police Chief Francis Keala for disciplinary action, maintained that it was not a judicial body.

Police officers accused of such misconduct as unprofessional use of force do not have a chance to appear before the commission, nor do they have other opportunities for a due process proceeding, the commission pointed out.

The Community Media Council asked Sen. Steve Cuff to seek a legal opinion on the issue from the attorney general’s office on its behalf. The council asked specifically if the names of the police officers could be released “in view of right-to-know statutes.”

According to the opinion from deputy attorney general Valri Lei Kumamoto, the identities of officers who are the subject of citizens’ complaints are not held in confidence and are not “lawfully” to be disclosed under a law adopted this year.

“We believe the information falls within the definition of ‘personal record’ and disclosure limited to the specified statutory exceptions,” Kumamoto said.

Under the new statute, personal records such as employment histories cannot be released unless conditions that include an individual’s consent are met. The law implements a constitutional right to privacy adopted in 1978.

It was not immediately clear from the legal opinion if the commission was in the right in withholding officers’ names to citizens’ complaints; held prior to the law’s taking effect. The decision by the commission to keep the names secret was announced Nov. 15, 1978.

Kunamoto also cited a 1974 Hawaii Supreme Court decision that police department records are not open to the general public’s inspection unless the chief of police agrees to the disclosure.

The court also made a distinction between the general public and parties involved in a civil suit involving police officers. In the latter case, the courts found that files — could be disclosed in certain situations, the court ruled.
Names of Accused Policemen Are Secret

The names of police officers accused by citizens of everything from brutality to discourtesy and investigated by the Honolulu Police Commission, in its role as citizen review board, are not public record, according to a legal opinion received by the Honolulu Community News Council.

The Media Council yesterday voted to drop its challenge to the Police Commission's policy of keeping its personnel secret after receiving the opinion from the state attorney general's office that such secrecy is permitted under the state privacy act.

The Police Commission investigates citizens' complaints against police officers and then commission members vote on whether they find the complaints justified. Complaints which the commission finds to be unjustified are referred to Police Chief Francis Keala for disciplinary action since the commission itself has no enforcement power.

UNTIL DECEMBER 1978, the commission made public the names of police officers when it upheld citizens' complaints against them. But since that time, the commission will only reveal the numbers of officers and complaints, but not the names.

A law passed by the last Legislature relating to limitations on public access to government records was cited by state Deputy Attorney General Vairi Kunimoto in answer to a request which predates the legislative session. The request was made in November by state Sen. Steve Cobol on behalf of the Media Council. The "Fair Information Practice act limits public access to personal records of government employees. "Other public employees are subject to public investigation for misconduct. We believe that members of a law enforcement agency have the same rights as other public employees," said Kunimoto.

She said the legal definition of "public record" specifically excludes "records which involve the right of privacy of an individual" and also cited the state Constitution which says: "The right of the people to privacy...shall not be abridged without the showing of a compelling state interest."

She also cited a Hawaii Supreme Court ruling that the records of the Police Department and the prosecuтор's office are not included among the city records that must be open to the public.

"THE POLICE Commission's decision to keep secret nearly two years ago was based on a similar legal opinion by the city corporation counsel's office."

The decision was initially opposed by the Honolulu Star-Bulletin and other media, but only the Honolulu Community News Council continued to pursue the matter, until yesterday's decision to drop it.

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A-10 Honolulu Star-Bulletin Wednesday, October 22, 1980

WED OCT 22, 1980 SP H
Psychiatrist Seeks to Recover Records

By Pat Guy
Star-Bulletin Writer

A Honolulu psychiatrist has gone to court to try to get back or suppress as evidence the records taken from her office last month by an investigator for the state Medicaid Fraud Unit.

Dr. Kerry Monick claims that the criminal search warrant was too broad and that the judge who issued the warrant did not have enough evidence on which to issue it. She also claims that seizure of the records violates her patients' right to privacy.


Kanbara said he would rule on the motion next Friday after getting further court memos from the lawyers.

Honolulu District Judge Andrew Salt issued the search warrant Aug. 6 based on an affidavit naming four persons who said they had gone to Monick for treatment but were treated by someone else. Medicaid pays higher rates to psychiatrists than psychologists and does not pay unlicensed professionals.

The search warrant authorized the investigator to obtain the records of the four individuals in the affidavit as well as 38 other files listed on a separate sheet which was with the warrant.

WHEN THE INVESTIGATOR came to Monick's South King Street office for the files, she called Edmunds and both lawyers agreed to seal the records until a court hearing is held on the matter.

Edmunds argued yesterday that Monick is looking out for the interests of her clients as well as her own because she could be sued for malpractice if she didn't attempt to protect the confidentiality of the records. Edmunds said that some of the records contained admissions of criminal conduct.

Eichor said his unit was not interested in the contents of the files, only the dates of the office visits and who gave the treatments.

Edmunds also argued that the affidavit did not contain enough supporting evidence. He said there is no information about the four informants and suggested that if they are seeking treatment from a psychiatrist they may be psychotics or pathological liars and therefore be unreliable.

Edmunds also said that it doesn't follow that evidence of possible Medicaid fraud in our files means it would be found in the remaining 38 files.

He said the fraud unit is trying to get around an injunction issued late last year by a federal judge that prohibits the use of administrative inspection warrants.

FEDERAL JUDGE William J. Byrne ruled that the law concerning such warrants violates a patient's right to privacy and a physician's right against unreasonable search and seizure.

A trial on the suit, brought by the Hawaii Psychiatric Society, was held in April but Byrne hasn't issued a decision.

Eichor argued that such an administrative warrant is different from a criminal search warrant based on probable cause. Eichor argued that Salt was given sufficient evidence to believe that the allegations made by the four patients were "the tip of the iceberg" of any fraud.

Eichor also said that privacy was a "false issue" because once probable cause of a crime is determined, an individual's right to privacy is secondary to the government's right to investigate and prosecute the crime.

He suggested that the patient records may prove to be the "dumbshell" in the case and therefore the most important evidence.

Edmunds also filed a similar motion in Honolulu District Court because he was unsure in which jurisdiction to proceed. A hearing there is scheduled for Thursday.
Names of Accused Policemen Are Secret

The names of police officers accused by citizens of everything from brutality to disloyalty and investigated by the Honolulu Police Commission, in its role as citizen review board, are not public record, according to a legal opinion reviewed by the Honolulu Community Media Council. The Media Council yesterday voted to drop its challenge to the Police Commission’s policy of keeping its data under secret after receiving the opinion from the state attorney general’s office that such secrecy is permitted under the state privacy statutes.

The Police Commission investigates citizens’ complaints against police officers and then commission members vote on whether they find the complaints justified. Complaints which the commissioners uphold are referred to Police Chief Francis Niall for disciplinary action since the commission itself has no enforcement power.

Until December 1973, the commission made public the names of police officers when it upheld citizen complaints against them. But since that time, the commission will only reveal the numbers of officers and complaints, but not the names.

A law passed by the last Legislature relating to limitations on public access to government records was cited by state Deputy Attorney General Vaiti Kanemoto in answer to a request which predates the legislative session. The request was made in November by state Sen. Steve Cobb on behalf of the Media Council.

The “Fair Information Practice Act limits public access to personnel records of government employees.” “Other public employees are not subject to public identification for misconduct.” We believe that members of a law enforcement agency have the same rights as other public employees,” said Kanemoto.

She said the legal definition of “public record specifically excludes ‘records which invade the right of privacy of an individual and also cited the State Constitution which says, ‘The right of the people to privacy...shall not be infringed without the showing of a compelling state interest.’”

She also cited a Hawaii Supreme Court ruling that the records of the Police Department and the prosecutor’s office are not included among “the city records that must be open to the public.”

The Police Commission’s decision to go secret nearly two years ago was based on a similar legal opinion by the city corporation counsel’s office.

The decision was initially opposed by the Honolulu Star-Bulletin and other media, but only the Honolulu Community Media Council continued to pursue the matter, until yesterday’s decision to drop...
Psychiatricist Seeks to Recover Records
Reconciling Privacy and Publicity

One of the most perplexing conflicts to arise in recent years in the area of public information is that between the public right to know and the personal right of privacy.

Suppose a now-upright citizen has a 10-year-old criminal conviction in his past. Why should that be dragged out in print now?

But how does the situation change if he becomes a candidate for public office or involved in a new crime?

The federal government has enacted both a Freedom of Information Act and a Privacy Act. It jealously guards records with one hand, and goes to great lengths to make them accessible with another.

Hawaii has a "sunshine" or open meetings and records law enacted in 1975. We also adopted a 1978 constitutional amendment stating that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

To implement the 1978 amendment, the 1980 state Legislature enacted a law defining how government agencies should handle personal records.

In the opinion of many, however, the existence of twin-privacy and sunshine laws at the federal and state levels solves some problems but also creates a lot of new ones. Litigation may be stimulated rather than minimized.

In that context, the Uniform Law Commissioners (ULC) who met on Kauai last week (see adjoining article) have taken a fairly imaginative new approach to the matter.

For consideration by all 50 states, Puerto Rico and the District of Columbia, they have proposed a law that wraps sunshine and privacy considerations into a single statute.

They started out a couple of years ago to frame a privacy act, but then realized the conflict with freedom of information, and decided to merge the two.

The act they adopted last week, by 43 to 7 on a roll call of the states (Hawaii voted yes), is now named the Uniform Information Practices Code.

Article I of the code states the twin objectives of enhancing government accountability through a general policy of access to governmental records and of protecting individual privacy where the public interest in disclosure does not outweigh the privacy interest.

Article II creates a system of openness and accessibility.

Article III outlines a system of privacy protections.

By combining the sometimes-opposed concerns into one statute, the proposed law successfully portrays their relationship to each other and suggests the kind of balances that should be struck.

This approach won't end litigation either.

But it seems worthy of examination as one of the most constructive efforts so far to resolve a quite difficult problem.
Right to Know

Meetings take place privacy vs.

By Jim Ferguson
Chief Paul yields to new law, refuses to release names of 2

TUE JUN 15 1993 4P

Hilo — Big Island Police Chief Guy Paul said yesterday that two officers in his department are being disciplined, but for the first time he refused to reveal the names.

Paul explained he could not publicly identify the two men because of the state's new privacy Act passed during the last legislative session and signed into law June 3 by Gov. George Ariyoshi.

Paul told reporters he took the action on the advice of the county corporation counsel's office, which is reviewing other police practices on the release of information to the public.

Paul said both officers had demanded their names not be revealed.

Act 126, the privacy law, was adopted in response to a constitutional amendment calling for limited disclosure of personal information. But legislative authors of the bill have said the intention of the lawmakers was not to suppress traditional police news.

One of the officers, a Hilo patrolman, was suspended for five days through July 25 for failure to file a timely report in violation of department regulations.

The other policeman, a Kona officer whose rank also was withheld by Paul for fear of identifying the miscreant, was suspended for two days for being absent from duty.

Details surrounding the infractions were not disclosed.

For more than a year, the police union has urged Paul to stop releasing the names of members being disciplined by the department. Paul had refused to accede to the demands until yesterday when he said the new state law forced him to quit giving out the names.
Government Records Can Be Corrected, Too

Individuals' Privacy Receives a Boost

By Sterling Morino
Star-Bulletin Writer

Individuals can inspect and correct government records about themselves under the recently enacted Fair Information Practice Act. On Saturday, Gov. George Ariyoshi signed the bill into law, implementing the controversial constitutional amendment protecting an individual's right to privacy.

It took two legislative sessions to implement the constitutional privacy requirement.

Under the act, an individual may inspect government records pertaining to him and correct them if he finds errors in the documents. If the government agencies decline to amend or correct the records, the individual can sue the agency in Circuit Court.

Records involving criminal activities are exempt from the act.

The law requires government agencies to set up procedures to implement the Fair Information Practice Act. Newspaper and government officials opposed various versions of the so-called privacy bill. Newspaper officials had warned of a restriction on access to records, and state officials said they wanted their departments exempt from the measure.

Ariyoshi said the act limits access of the public to certain types of government records, including educational, medical, employment or financial histories. Legislators said the restrictions would not inhibit viewing of traditionally public records.

The law also sets restrictions on disclosure of government information to other government agencies.

OTHER HILLS signed into law by Ariyoshi will:

- Increase personal income tax exemption deductions from $50 to $1,000 per exemption, conforming state law with the federal income tax law. The increased deduction will go into effect in the 1980 tax year.
- Permit the statue, entitled "The Spirit of Liliuokalani," to be permanently placed in the State Capitol complex.
- Require the state Department of Transportation to develop and promote ride-sharing programs and give the department authority to issue management contracts to private organizations for operation of the programs.
- Reduce the liability of owners of dogs that bite or attack people, placing more responsibility on the owner, but excusing dog attacks on trespassers.
- Increase the amount of general excise tax credits under state income tax, in order to help offset inflationary consumer costs.
- Revise state tax law by allowing deferral of financial gain from the sale of a residence only if the taxpayer purchases a replacement residence in Hawaii or is a resident taxpayer.
- Encourage development of housing for persons with developmental disabilities.

Tuesday, June 10, 1980
Good marks in implementing amendments

Lawmakers tackle constitutional changes

By SANDRA S. OSHIRO
Abernethy Government Bureau

As Hawaii's legislators attempt to implement the 1978 constitutional amendments, they have— at times— found themselves caught in an exercise akin to untangling a pretzel.

It's easier said than done.

But after two sessions of wrangling with the sometimes ambiguous and controversial changes to the state's basic legal document, the scorecard shows the 10th Legislature in the black.

Except for a few weighty amendments that will require much work in sessions ahead, lawmakers have pretty much done their appointed duty in meeting the constitutional mandate of two years ago.

Roughly 100 sections of the Constitution were in some way changed when voters approved all amendments proposed by Constitution Convention delegates.

Some of the controversial changes, including the "right to privacy," which requires legislators to take "affirmative steps" to implement that right, have taken two sessions to resolve.

Not all people are happy with the results. Some news organizations grumbled that the "affirmative step" taken in a bill to implement the privacy right by drawing guidelines for gaining access to personal records on the state's government agencies is actually a step backward from an open government.

The bill now awaits the governor's review.

According to Senate Judiciary Chairman Dennis O'Connor, the bill is just the first attempt at fulfilling the constitutional privacy right.

Other legislative action can be expected in sessions ahead, he said.

O'Connor, who has taken the lead in drawing up laws to implement the amendments, has proceeded cautiously in several of the implementing bills.

Some changes, like the staggering of senatorial elections, are fairly straightforward and took effect immediately. Others, like the creation of the Office of Hawaiian Affairs, are complicated matters that change the fundamental structure of state government.

In the case of OHA, voters approved a constitutional amendment which establishes the agency as an equal to and independent of the executive, judicial and legislative branches of government.

Discussions over the funding of OHA were among the most heated this session. In a proposal now before the governor, the office would be funded by proceeds from a public trust and from general revenues, a sum of about $1.1 million.

Other costs of the 1978 amendments are emerging.

Lawmakers set aside $2 million to operate the new intermediate appellate court through June 1981; a requirement that a voter's political preference be kept secret and the first-time election of OHA trustees are major reasons why financial officials asked for about $200,000 this year for expected expenses; salaries for 76 legislators will go up from $12,000 to $13,850 next year under a plan made possible by a constitutional change.

And the total bill is not yet in.

Lawmakers approved the procedures for hiring attorneys for grand juries this year, another expensive proposition. Five-day legislative recesses, public funding of campaigns, and the transfer of real property taxing powers to counties are among a few of the changes which will add to the final public cost.

However, there were savings, too, built into some of the constitutional changes.

One change to make federal and state tax laws conform as much as possible may resp

See LEGISLATURE on Page A-4
House Passes Privacy Legislation

With little fanfare, the state House last night adopted a bill that would restrict public access to "personal records" kept by government agencies.

House members approved unanimously the bill designed to meet a state constitutional amendment establishing an individual's right to privacy. The Senate is expected to take up the bill today.

The measure would allow individuals access to government records about themselves, except criminal investigation files. It also would permit them to correct any errors in the documents.

Under the bill, personal records are defined as an 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 fingerprint or voice print or a photograph."

Also, included in the definition of personal records are public records.

AFTER INQUIRIES by insurance companies and newspaper reporters, House Judiciary Committee Chairman Dennis R. Yamada, D-Duhi-Dist. (Kauai-Nihau), said personal records can include public records, but other provisions in the bill clearly state that records required to be open to the public under state law will not be restricted.

The bill prohibits government disclosure to the public of personal records, but exempts information collected for the purpose of a public record.

The conference committee report on the bill says the concept of privacy "is a nebulous one."

"To constric the parameters of privacy with burdensome legislation would have a stifling effect upon the free exchange of information and ideas, and yet, some protections must be afforded," the conference committee report says.

"A genuine attempt has been made to enact a law dealing with the right of privacy, and affecting the relationship between government and individuals which will effectively coordinate public access to public records, while maintaining the confidentiality of personal records."
To Implement Constitutional Amendment
MON FEB 18 1980 SB H

Right to Privacy Bills Raise Questions

By Shirlfi Morita
Star-Bulletin Writer

State Sen. Dennis O'Connor says he may use a proposed national model statute to give citizens the right to privacy mandated by Hawaii's voters as a constitutional amendment in 1978.

After a Senate Judiciary Committee hearing Friday on the sticky privacy issue, O'Connor told reporters that Senate Bill 2766, outlining standards proposed by the National Conference of Commissioners on Uniform State Laws, may be amended to fit Hawaii's needs.

O'Connor, D-Atherton (Kaimuki-Hawaii Kai), said the bill seemed to address the concerns of newspapers and the attorney general's office.

Another hearing will be held at a later date.

The proposed uniform code would provide for a privacy act as well as a freedom of information act. It exempts from public records the following information: Medical records, investigative files, welfare benefits, employment histories, income tax returns, an individual's financial background, inquiries into a license applicant's fitness, personal evaluation and racial background.

The measure would require that a state agency answer an individual's request for information within two weeks. An individual, turned down on disclosure of information, can appeal to the agency head and then to Circuit Court. If the individual wins the case, then the agency would have to pay for attorney's costs.

The attorney general's office is against the bill because it would "set up a whole new level of bureaucracy." Hawaii should not pattern legislation after the federal Freedom of Information Act, which has been severely criticized by law enforcement agencies, the attorney general's office said.

During the hearing on other privacy measures, Honolulu Advertiser and attorney general officials told the committee that they feel Senate Bill 920 would be the proper bill to flesh out the constitutional right to privacy.

It allows access to government records, except criminal investigation reports and identification of informants and testing materials.

REGARDING THE OTHER PROPOSALS, Buck Bachwach, Honolulu Advertiser's executive editor, said: "No one has ever questioned the importance of the right of privacy in a democratic society, or the importance of access to information which is essential to the healthy functioning of that society.

"The real issue is how to strike an equitable balance between the two. "With all respect, I must say that the two bills (Senate Bills 8 and 1830) under discussion do not achieve that. Regrettably, they come on more as secrecy bills than privacy bills."

Insurance officials questioned whether the measures would cut off their access to driving records that permit them to base rates on a driver's past record. But O'Connor said there is an "implied consent" for the companies to look at the records when someone applies for insurance.


"Only in the state in the country that does not have open vehicle registration records?"

"Because we have a privacy amendment," O'Connor answered.
Privacy bills generate more opposition

By SANDRA S. OSHIRO
Advertiser Government Bureau

The Legislature's latest attempt to carry out a constitutional change relating to privacy drew more opposition from state agencies, news media spokesmen and business groups yesterday.

The constitutional amendment, adopted by voters in 1978, states that the "right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." It goes on to direct the Legislature to "take affirmative steps to implement this right."

The change spawned several bills this session, including proposals that would create an Office of Information and establish a set of stringent rules governing the release of information by state and county agencies.

Government officials, members of the press and others complained last month during a joint hearing of the Senate and House Judiciary committees that the proposals would generate serious problems.

More such complaints came yesterday.

The Senate Judiciary Committee heard the attorney general's office predict that a new level of bureaucracy could be created under the proposals. Deputy Attorney General Paul Toyozaki said "great administrative inconvenience" and expense would result from the legislation.

He predicted that government employees would probably withhold information rather than risk the chance of violating the rules and drawing penalties on themselves for doing so.

According to Toyozaki, the right to privacy does not require legislation, but is "self-enacting and that will be judicially tested and implemented on a case-by-case basis."

Buck Buchwach, Honolulu Advertiser executive editor, said neither of the two major bills under consideration achieves a balance between privacy and the need for free access to information. Speaking for Editor in Chief George Chaplin, Buchwach said the measures "come on more as secrecy bills than privacy bills."

Buchwach suggested the committee make a "good-faith move" toward fulfilling the constitutional mandate by adopting a bill that would allow individuals access to their personal records in state files. They should also have the opportunity to amend the records when the information is inaccurate or incomplete, he said.

Buchwach also suggested the committee await action by the National Conference of Commissioners on Uniform State Laws, which is expected to adopt a model statute on privacy and freedom of information.
Secret Service Problems Told by Director

By Sue Glazer
San Francisco Examiner

Suggesting that the U.S. Secret Service is not all secrets, G. Stuart Knight, its director for the past six years, yesterday shared a couple of his toughest problems with the Rotary Club of Honolulu.

He said that while his 1,600 special agents have had great success solving crimes involving counterfeiting currency, they face far greater challenges when it comes to protecting or preventing crimes.

Part of their problem is obtaining what is called "that slimy word today — intelligence" and part of the solution would be curtailing the existing privacy and information acts, he said.

The Secret Service now provides around-the-clock protection for 18 persons in the families of U.S. presidents and vice presidents, four candidates for the presidency and an average of 115 visiting heads of state annually.

PREVENTING crimes against these persons has become more difficult because law enforcement officers are hampered by the "guidelines, court decisions and regulations — or the lack thereof" needed to help them obtain information.

"If I am responsible for preventing something from happening, it strikes me the best tool I have to carry out that responsibility is to know beforehand who is planning to do what to whom, when, where and how," he said.

He said such vital information was missing in 1975 when Lytette "Squeaky" Fromme and Sarah Moore tried to assassinate President Gerald Ford.

"It's a very difficult question — how much information should be accumulated, about what kinds of people, where should it be maintained and stored, and equally important with whom should it be shared," he said. "And to do all of that and still not violate the civil rights that you and I cherish so very deeply..."

"WE THINK we should have a little more latitude," Knight said. Congress should reexamine the Freedom of Information and the Privacy acts, he said. So did FBI Director William Webster favor a 10-year moratorium on the "two laws."

"They are not mutually compatible... what is permitted under one is denied under the other... and they weren't passed in concert," Knight said. "It's a very expensive law to administer $16 million a year,"

In response to a question from the floor, he said gun control poses another difficult problem.

A lifelong member of the National Rifle Association, Knight said he does not agree with the association's position of no regulations or with those who say the U.S. Constitution guarantees the unrestricted right to weapons and to bear arms.

He said he wants to deny access — and easy access — to handguns to the criminals, mentally ill, and some mentally unstable, but doesn't know how to do about it and how to curtail the bureaucratic, which would result from federal attempts to control handgun ownership.
Senate bills to make it tougher for criminals in the courtroom

By SANDRA S. OGIRO

State Capitol Bureau

Criminals would have a harder time of it in court under several bills introduced yesterday in the Senate.

Legislation introduced by Judiciary Committee Chairman Dennis O'Conner would require mandatory imprisonment when it appears that a convict would commit another crime under a suspended sentence or probation. The court also would be required to impose a jail sentence if the defendant could best be treated in an institution or if a sentence less than imprisonment would "depreciate the seriousness of the defendant's crime."

Another O'Conner bill would make it easier to target individuals as "career criminals," for the purposes of prosecuting them, by broadening the definition of a career criminal.

Still another crime-related bill would remove the Hawaii Crime Commission from the lieutenant governor's office and place it under the office of the attorney general.

The character of the commission would be changed. Instead of a panel composed of 12 members representative of the public, the commission, with nine members, would have at least one law enforcement officer, a state or private attorney and a state court judge.

O'Conner said that to generate discussion, he introduced a bill to establish certain safeguards against invasions of privacy, as required by a Constitutional Court, a amendment.

The bill sets up an office of information that would handle requests from individuals for data about them contained in state and county files. It also bars disclosure of any personal or confidential information except under certain guidelines.

The Senate will also take a look at a bill, introduced by Sen. Paty Young, which would lift the ceiling off the amount of interest that financial institutions can charge for mortgage loans. The usury ceiling would be lifted only from July 1 to June 30, 1980, under the bill.

A comprehensive package of energy-related bills was proposed by Sen. T.C. Yim.

The bills would provide $40 million for alternate energy projects; establish an alternate energy development fund; mandate that the state set up a carpools program for its employees, and require that gasoline be used in state vehicles.
Legislators Again Tackle Privacy Bill

By Shirlin Merlino
Star-Bulletin Writer

CREATION OF A commission that would decide whether government records should be open to the public might answer objections to legislation attempting to implement a state constitutional amendment on right to privacy, a key legislator has said.

Rep. Dennis R. Yamada, D-7th Dist. (Kauai-Nihoa), said he was thinking of proposing a commission that would be empowered to determine whether records are public and to handle disputes about accuracy of some records.

Yamada, House Judiciary Committee chairman, said the issue, one of the most important and complex issues in the 1980 legislative session opening Wednesday, might be resolved through the establishment of guidelines for the commission to follow.

News media representatives and some government officials have opposed bills submitted last year on the privacy issue, saying the measures would cut off public access to government records.

Both Yamada and Sen. Dennis E.W. O’Connor, Senate Judiciary chairman, said the privacy amendment will not be fully implemented this year. They said it probably will take many legislative sessions to complete legislation on the privacy issue.

Voters in November 1978 approved the state constitutional amendment that says: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

O’Connor said it is important to get privacy legislation on the books this session.

If Hawaii does not define privacy, then the courts might make decisions on the issue, he said.

For example, in Alaska a court has ruled home use of marijuana is legal and in Montana, another court turned down a wiretap that had been made with the consent of one of the parties, he said.

Yesterday, the House and Senate Judiciary committees heard additional testimony on the privacy issue — similar to comments last year opposing the bills.

George Chaplin, Honolulu Advertiser editor, said the Legislature should wait another year on the measures until the National Conference of Commissioners on Uniform State Laws drafts a "model" statute on privacy and freedom of information.

Chaplin said he could support a privacy law if there were a companion bill similar to the federal Freedom of Information Act that spells out which government documents are available and sets the structure for appeal of governmental denial of access to records.

REP. RUSSELL BLAIR said he has submitted a bill to amend the state’s Sunshine Law. He said he is considering specific categories of government records to be inserted into the law because it is broad and vague.

"The right of privacy is, of course, vital in a free society," Chaplin said. "The real question is how to properly protect against the invasion of individual privacy while preserving that access to information which is essential to the healthy functioning of a free society."

Several government officials testified, noting that the privacy measures now pending before the two committees should exempt their departments.

They said state law exempts many of their records from public view, but indicated that a privacy measure could hamper their operations.

Gary M. Slovin, executive director of the state Ethics Commission, said the commission is "concerned that some of the restrictions proposed in the bills, if enacted, would prevent the disclosure of public records that should continue to be available for public inspection."

SLOVIN ALSO SAID the Ethics Commission is concerned about confidential sources of information that might be revealed if unedited records are made available to individuals entitled to receive the records.

Legisulative Auditor Clinton T. Tanimura said the pending measures could hamper his auditing powers.

"In the conduct of audits, there are numerous instances and situations where the examination of records or information on individuals is necessary," Tanimura said.

"In such instances, a requirement to obtain the written consent of individuals would seriously impede the conduct of the examination. It would also affect the legislative auditor’s statutory authority to inspect and examine all books, records and files."

A deputy attorney general told the committees that, from past experience, the federal government has found privacy and freedom of information acts to be costly in servicing the public.

He also said the state bills are broad and vague.
Potential problems seen in privacy law

By JERRY BURNS
Advertiser Politics Writer

A new constitutional right to privacy guarantee could create serious problems for law enforcement officials, government regulators and the news media, state lawmakers were told yesterday.

The occasion was a joint hearing by the House and Senate Judiciary committees on the right-to-privacy amendment which was placed in the Hawaii Constitution in 1978.

The wording of the amendment is relatively simple: "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."

But, legislators were told, enforcing it by law could create numerous problems.

Several of those who testified urged that the Legislature hold off until the National Conference of Commissioners on Uniform State Laws takes up the issue this August on Kauai.

As the proposed legislation is now written, said Advertiser Editor-in-Chief George Chaplin, "it is more a secrecy bill than a privacy bill."

"If it is adopted in its present form, it would create chaos in virtually every state and county agency; strangle the public's First Amendment right to know; create endless legislative and judicial combat; and develop an environment of substantial public befuddlement," Chaplin said.

The uniform law commissioners will likely approve a proposed model privacy act at their August meeting.

Chaplin said.

Deputy Attorney General John Campbell also urged the legislators to wait until the Kauai meeting, saying the proposed law was vague, overbroad, unworkable and potentially very expensive.

However, Senate Judiciary Chairman Dennis O'Connor said after the informational hearing that the Legislature may be forced to do something about the amendment this session. He noted that the amendment itself calls on the Legislature to take "affirmative steps" to implement the right to privacy.

Just what those steps should be, he said, will be discussed as the session progresses.

One approach, he suggested, would be to work on a simple statutory definition of "privacy" as it applies to government actions. Implementation of the right could then come through rules and regulations.

While Chaplin said the proposed law (modeled on the federal privacy act) would restrict the public's right-to-know, others said it would hamper government activities.

The Ethics Commission, ombudsman, legislative auditor and Tax Department all asked to be exempted from certain portions of the measure.
Ruling Hurts, but Isn't Fatal to Island Medicaid

By Jim McCoy
Star-Bulletin Writer

The chief of the state's Medicaid anti-fraud unit said yesterday's ruling striking down unconstitutional portions of the Hawaii Medicaid anti-fraud law will put a crimp in Medicaid fraud investigations but won't stop them.

Rick Esch, deputy attorney general in charge of the anti-fraud unit, was reacting to the ruling made public yesterday by Los Angeles federal Judge William M. Byrne.

"In a decision hailed as a "landmark" by American Civil Liberties Union attorneys, Byrne struck down portions of the Medicaid anti-fraud law passed by the Legislature in 1972."

TUESDAY, OCT 23, 1979 SB H:

BYRNE SAID in a 51-page ruling that the law violates a patient's right to privacy and a physician's right to be free from unreasonable search and seizure.

The law was passed by the state Legislature to ensure quality health care and also to maintain "fiscal integrity" in the Medicaid program. The state and federal governments spend an estimated $500 million a year on Medicaid claims filed in Hawaii, according to the attorney general's office.

Commenting on the ruling's effect on Medicaid fraud investigations, Esch said: "Anyone you have a tool, it's going to hurt you. It's not going to hamper us, that much. The ruling will require that we pay a little longer and a little harder, but it won't prevent us from making cases."

The "tool" Esch was referring to is the administrative inspection warrant which the Legislature provided to anti-fraud investigators. The warrant allowed the search of confidential files of Medicaid physicians under a relaxed standard of what is called "probable cause."

BYRNE ISSUED a temporary restraining order prohibiting investigators from searching records under this type of warrant.

The judge agreed with the Hawaii Psychiatric Society that the statute allowing issuance of this type of warrant is unconstitutional because it violates the physician's rights against unreasonable searches and seizures and the patient's Ninth Amendment rights of privacy.

The psychiatrist's records may include the patient's most intimate thoughts and emotions, as well as descriptions of conduct that may be embarrassing or illegal." Byrne said in his ruling. "The possibility that these records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an invasion into the right of privacy warranting protection under the compelling state interest standard."

According to Esch, the ruling will affect Medicaid fraud investigations that investigators will now have to conclude whether to obtain a criminal search warrant—which carries a far higher "probable cause" standard than the administrative inspection warrant—before searching files for evidence of Medicaid fraud.

IN HIS DECISION, Judge Byrne said that state arguments that Medicaid patients waive their rights of confidentiality by executing the Medicaid card are invalid.

"Society spokesman, Dr. Robert Marvit yesterday said the society is 'pleased' with the decision, which Marvit said "undercuts and protects the constitutional right of a patient's privacy against this unreasonable intrusion."

Marvit noted that under the 1972 law the only standard the state needed to obtain an administrative search warrant was that the doctor 'sention to follow was in the "public interest."

"SAYING THE society is pleased over instances of Medicaid fraud, Marvit said the society is working to "come to some agreement with the state about how quality of care can be ascertained without hurting the doctor-patient relationship."

"Byrnes's decision has a far higher threshold for those instances where the society thing the patient's records cannot be accessed without hurting the patient's relationship."

Monday, October 23, 1979 - Honolulu Star-Bulletin

Fraud Unit
State Ordered
Not to Probe
MON OCT 22 1979 SB H
Medical Data

A Los Angeles judge today issued a temporary injunction ordering the state to halt its searches of psychiatrists' medical records for instances of Medicaid fraud.

In a 52-page decision, filed today in federal court, Judge William M. Byrne Jr. ruled that the state's search efforts violate the constitutional privacy rights of Medicaid patients.

The decision was hailed by American Civil Liberties Union attorney Mark Davis as "a landmark case with the respect to the privacy rights of a patient."

The Hawaii Psychiatric Society filed a lawsuit in March challenging the constitutionality of the 1978 state law which allows investigators to obtain search warrants when they suspect doctors and other medical professionals of submitting fraudulent medical claims for Medicaid payments.

It was that law which was struck down by Byrne as unconstitutional. Byrne heard arguments here on the case in April.

State Medicaid fraud unit spokesmen could not be reached for comment today.

Byrne also ordered the state to return all the records it seized from the office of Virgil Willis, a clinical psychiatrist indicted by federal grand jury in July on 40 counts of fraud in connection with Medicaid payments.

However, court records indicate that Willis was scheduled to appear in federal court later today to change his earlier plea of not guilty. Terms of his plea agreement were not disclosed.
DOH Is Ordered to Open Files

The public's right to know insures that there will be fairness and honesty in government, Circuit Judge Arthur S.K. Fong said yesterday in granting a court order to the Honolulu Advertiser permitting it access to state Department of Health files.

Fong said state law is clear that anything in a file is public record except what's privileged, such as personal financial information.

"I'm for open government," Fong said. "The Legislature intended everything to be open."

The Advertiser sought the court order after Health Department officials refused to allow one of its reporters to review memos on the leakage of sewage from the Milliken sewage treatment plant into Kipapa and Waikiki streams.

Fong said that "the more we shine our light on the people who represent us, the better off we are. The more we allow ourselves to be investigated, (means) Watergates will not exist."

State Deputy Attorney General Laurence Lau argued that only items required by law to be filed should be shown to the public and that the state has the discretion to determine what information is useful and therefore should be made available.

LAU ALSO SAID the state can determine whether the person requesting public records has a "just and substantial interest" in asking for the information.

Fong said of this contention that "the government wants the right to censorship and I will not impose it."

He also noted that the information sought by the Advertiser had been shown to reporters for the Sun-Press, a weekly neighborhood newspaper.

Lau said this was a "mistake."

"So when the heat got up, you wanted out of the kitchen," Fong replied.

Lau indicated the state might appeal the ruling but Fong said he would not grant a stay of his order even if it is appealed.

The Advertiser was represented by attorney Jeffrey Portnoy.
**IRS ‘income probes’ draw fire from CPA**

By TOM KASER

The Internal Revenue Service has quietly been conducting open-ended "income probe" audits of Hawaii taxpayers for about the last eight months, and a Honolulu certified public accountant contends that they are illegal.

Leonard Mednick, who is representing several taxpayers charged in for such audits, calls the IRS’s Income Probe Project a “fishing expedition” that violates the U.S. Privacy Act of 1974.

William M. Wolf, IRS district director in Hawaii, replies that the IRS has the right to examine taxpayers’ financial records for unreported income and other things. He also maintains that such audits have been made in the past.

Mednick, who acknowledges that his relationship with the IRS is largely confrontational, has received unconfirmed reports that some 300 Hawaii taxpayers have been audited under the Income Probe Project so far. Several of his new clients have been taxpayers seeking assistance after having been called in for income-probe audits, he said.

"Normally when you’re called in for an audit, the IRS people explain why they are conducting the audit and what they are looking for, and they attach to their letter a list of specific records you are to bring in," Mednick said in an Advertiser interview.

"With income-probe audits, they’re more like a general fishing expedition. They simply ask you to bring in, but don’t specify what they’re interested in," he said.

Wolf said the IRS wants more information about the taxpayers’ "wholly separate economy" of unreported income, as has been reported in the national press, and that the IRS feels that the only way to get that information is to probe people’s sources of income more diligently.

By design or accident some taxpayers fail to report such income as dividends, tips, consulting fees, income from a second job, and capital gains from stock and real estate transactions, he said.

"This income usually shows up in bank statements, tax returns, bank accounts, and other records, and we feel we have not only the right but the responsibility to seek it out. Our experience is that unreported income is fairly common," Wolf said.

Mednick objects to the IRS’s fishing license, saying the IRS does not have the right to look into “anything” about a given taxpayer. "But we do have the right to look into anything related to your income and deductible expense," he added.

Responding to Mednick’s "fishing license" accusation, the Advertiser recalled a court case in which Exum Corporation — also claiming the IRS was fishing — refused to produce financial records the IRS had requested. When Ewing, the IRS’s senior auditor, had asked, "Is there any other fish?” the judge held that the IRS must be given "the license to fish.”

Wolf says various sections of the Internal Revenue Code give the IRS the right to examine any books, papers, records or other data which may be relevant or material to such inquiry.

Aside from its Income Probe Project, the IRS’s Hawaii district has been performing about 8,000 audits a year in recent years.

Leonard Mednick
IRS probes illegal!

William Wolf
IRS has ‘fishing license’

Wolf says between 20 and 25 percent of these are cleared without any further action, about 5 percent involve a refund to the taxpayer, and the rest involve a payment and/or penal.

How does the IRS decide whom to audit?

Everything begins at the IRS’s western regional center in Fresno, Calif., where a computer automatically "flags" tax returns that score highly according to an analysis formula that the IRS will not publicly disclose.

The flagged returns are then studied by IRS staff workers who decide whether to recommend an audit at the district level. In the end, it is the district office that decides who shall be audited.
Oregon's 'Privacy' Law

© Excerpt from the monthly news report of the American Newspaper Publishers Association.

Oregon may have done the nation a good deed recently by giving us a glimpse of an Orwellian world in which all information from criminal justice agencies is shut off. The Oregon legislature, low on time and_samples in July, passed a last-minute "privacy" bill intended to end "exposing" in police files and to allow defendants the right to inspect and correct their records.

When the law became effective in August, Oregon citizens discovered what it really did — shut off all criminal justice information for everyone except law enforcement officials, defendants or their lawyers. The result was chaos, not justice. In Pendleton 178 persons were jammed into cell over one weekend, unable even to make bail because officials couldn't tell relatives and friends they were locked up.

A special legislative session was held and the law repealed, but not without a grim reminder of what happens when good intentions aren't well thought-out. Congress is actively working on privacy legislation, which, while it doesn't go quite as far as the Oregon law, goes far enough that it should be considered only with the utmost deliberation, care and uncurried restraint. It was not just the news press that got hurt by the hasty Oregon privacy law; it was primarily the private citizen whose rights were trampled.
State Constitution Changes
Still Need a Load of Work

State legislators will plow through a lot of interim work in order to flesh out state constitutional amendments left over from this session.

Many of the constitutional amendments — ratified last year by the voters — require detailed study, legislators said, noting that information from the state Constitutional Convention is too sketchy to fill in legal frameworks.

Legislators have put in a lot of time this session in adopting two major amendments establishing campaign spending limits and the Office of Hawaiian Affairs.

Other top amendments, in the form of bills, adopted and sent to the governor's office include open primary elections, a code of ethics for government officials, an intermediate appellate court and a judicial selection commission.

NOTING THAT there is no imperative need for implementation, the House did not report out a controversial resign-to-run measure — where elected officials have to resign from office in order to run for another office.

One key measure facing legislators next session will be the creation of the proposed state water commission. Interim work will be done by the House Committee on Water, Land Use Development and Hawaiian Homes to determine what the powers of the commission will be.

The commission's powers could involve control of development through management of Hawaii's water system — something that the counties could say would be usurping their zoning and water control powers.

OTHER MEASURES awaiting interim work include the definition of the right to privacy, establishment of special purpose revenue bonds, state spending limits, transfer of the powers of real property tax assessment to the counties from the state; definitions for state's share in counties' cost of any new program or increased services required by the state and criteria for state grants of money to private organizations that serve a "public purpose."

Other measures set up for interim work are management of the state's population growth, establishment of a Hawaiian education program, public land banking, environmental rights, marine resources and agricultural lands.
Medicaid probe an invasion of priv...

SAT MAR 10 1979 AD’F
BY DAVID TONG
Advertiser Staff Writer

The Hawaii Psychiatric Society says in a lawsuit filed in federal court that doctors and patients’ rights to privacy are being violated when state investigators search through medical records looking for cases of Medicaid fraud.

But the state’s Medicaid fraud investigation unit responded that “we pay the bill for those patients and have the right to see what service those patients are getting.”

The suit by the Hawaii Psychiatric Society challenges the constitutionality of a law that authorizes search procedures for the records of providers of medical service to the poor under the Medicaid program.

State investigators are allowed by law to get such search warrants when they suspect doctors and other medical professionals of submitting fraudulent claims for Medicaid payments.

The class-action suit says the law, which was passed last year, represents an unconstitutional invasion of privacy and constitutes an unreasonable search and seizure of patient files.

At issue is the legality of the administrative search warrants used by investigators working for the state’s Medicaid Fraud Unit.

The warrants can be issued by any state judge when a “valid public interest in the effective enforcement” of the anti-Medicaid fraud statute is at stake.

The suit claims the scope of the warrants is too broad because it allows investigators to search and copy records with only a minimal showing of probable cause.

Named as defendants in the suit are Gov. George Ariyoshi, Attorney General Wayne Minami, Andrew Chang, state Social Services and Housing director; and Rick Elchor, a deputy attorney general who heads the Medicaid fraud unit.

One of the two plaintiffs in the suit, Virgil Willis Jr., a clinical psychologist, said state investigators used an administrative warrant to photostat his records of private as well as Medicaid patients.

Moreover, he claims, the records included, among other things, therapeutic notes, patient history forms, diagnoses and financial records.

The suit demands the return of Willis’ records, an injunction against the enforcement of the state law and a ruling on the constitutionality of the law.

Commenting on the suit, Elchor said, “The law is not unconstitutional. Very extensive research was done on it. The administrative inspection statute is similar to those in other states and the federal code.”

“As far as Mr. Willis is concerned,” he added, “we did not look at any private patient records. We only looked at Medicaid patient records and copied only those documents as provided for in the statute.”

He said the state’s Medicaid fraud unit began operating last July 1 and is responsible for investigating fraud and abuse in the Medicaid program.

In establishing the unit, he said, the state provided the authority for the investigation of Medicaid records. “We have a right to look at them regardless of the administrative warrant,” he said.

Dr. Robert Marvit, Hawaii Psychiatric Society spokes-
man, “Psychiatrists least entitled to search records as part of their professional responsibility.”

“We believe Medicaid recipients have the same constitutional rights as do the private sector.”

A Hawaii Medical Society committee has expressed concern about the new law, saying it would curtail medical care for the poor and that it is unconstitutional.
Id probe an invasion of privacy?

get such search warrants when they suspect doctors and other medical professionals of submitting fraudulent claims for Medicaid payments.

The class-action suit alleges the law, which was passed last year, represents an unconstitutional invasion of privacy and constitutes an unreasonable search and seizure of patient files.

At issue is the legality of the administrative search warrants used by investigators working for the state's Medicaid Fraud Unit. The warrant can be issued by any state judge when a "valid public interest" exists, and it can be used to search and copy records with only a minimal showing of probable cause.

Namely, as defendants in the suit are Gov. George Ariyoshi, Attorney General Wayne Minami, Andrew Chang, state Social Services and Housing director; and Richard Eichor, a deputy attorney general who heads the Medicaid fraud unit.

One of the plaintiffs in the suit, Virgil Wills Jr., a clinical psychologist, said state investigators used an administrative warrant to photocopy his records of private as well as Medicaid patients.

Moreover, he claims, the records included, among other things, therapeutic notes, patient history forms, diagnosis and financial records.

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Commenting on the suit, Eichor said, "The law is not unconstitutional. Very extensive research was done on it. The administrative inspection statute is similar to those in other states and the federal code."

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In establishing the unit, he said, the state provided the authority for the investigation of Medicaid records. "We have a right to look at them regardless of the administrative warrants," he said.

Dr. Robert Marvin, Hawaii Psychiatric Society spokesman, said his society was "extremely concerned about protecting patient confidentiality from the unlimited discretion of government officials."

"Psychiatrists and their patients are at least entitled to the same minimal constitutional protection against unreasonable searches and seizures as are those suspected of criminal offenses.

"We believe in strict enforcement of the Medicaid regulations and government officials must maintain a reasonable sensitivity to the privacy and confidential records of mental health patients."

A Hawaii Medical Association official declined comment on the suit. She said the matter has been referred to the association's legal counsel for review.
Cutting of state ethics law
feared in proposed change

By JERRY BURRIS
Adviser Politics Writer

A proposed change in the state ethics law based on new right-to-privacy language in the state Constitution would effectively gut the law, a Senate committee was told yesterday.


Essentially, the change would allow a public official to decide whether a financial holding caused a conflict of interest with his official duties, Slovin said. Only if the official believed that there was a conflict would he be required to disclose the holding to the state Ethics Commission.

Kawasaki, whose Government Operations and Efficiency Committee was hearing testimony on the measure, said the bill was designed to save public officials the trouble of revealing irrelevant financial information.

The current state law on disclosure, which covers all state legislators and certain high-level and decision-making officials, goes too far, Kawasaki argued.

"I consider this to be a violation of a person's privacy," he said.

But Slovin said the proposed change would wipe out the current law, rewritten just last session, and would run counter to the intention of last year's Constitutional Convention.

The recent Con Con, Slovin noted, approved an ethics code that requires, with a strictness at least equal to that of the current law, public disclosure of financial holdings.

"The main problem with the proposed change, Slovin said, is that it leaves the decision up to the public official involved."

"The fundamental approach of the present disclosure provision is that the public official should not be the one to determine if an interest may or may not conflict with his or her state duties," he said.

In an explanation for the change attached to the bill, another Con Con amendment is used as justification for the measure.

"Since the state Constitution has added a right to privacy in the bill of rights which expresses that the right to privacy shall not be infringed without the showing of a compelling state interest," the bill says, "it is in line with this amendment to require state employees and legislators to disclose only truly relevant financial information . . . ."
Physician-Teen-ager Relations Bill Gets Strong Backing

By Helen Allom
Star-Bulletin Writer

A proposed House bill to provide patient-physician confidentiality for adolescents received overwhelming support at a legislative hearing yesterday because of the increasing number of sexually active teenagers.

The measure would give physicians discretion to withhold information from parents on medical services to minors. They are now required to disclose such information by law.

Concerned officials say they hope that with increased confidentiality more teenagers would seek family planning services and medical treatment if needed.

The proposed bill was discussed at a joint hearing yesterday of the House Health and Youth and Elderly Affairs committees.

SPEAKERS CITED statistics pointing to the rising number of sexually active teenagers and resultant increase in pregnancies and abortions among teens.

Dr. Roy Smith, of the University of Hawaii School of Public Health, said 26 states and the District of Columbia already have laws "affirming the right of young people to consent for their own contraceptive care and are attempting to stem the tide of the epidemic of unplanned and unwanted teen-age pregnancies."

"Our data and experience are strong statements which we can no longer afford to deny," he said. "Teen-age sexual activity is here to stay.

"Unless we provide young people with their right to privacy and the right to make responsible decisions regarding their reproductive lives, and until physicians are protected by law, such as this bill provides, many minors will continue to be deprived of ready access to reproductive health care services and will continue to have unwanted pregnancies."

The HAWAII Medical Association said it "believes that the unmarried female of any age, whose sexual behavior exposes her to possible conception, should have access to the most effective method of contraception."

The association noted that the U.S. Supreme Court in 1973 gave minors the constitutional right to prevent pregnancy without parental consent and said Hawaii's laws should provide minors with the same right to privacy.

"This bill will also give the treating physician discretion to inform the parents when the minor patient receives family planning services or is diagnosed as being pregnant," the association said.

"We support this provision because the treating physician is in the best position to determine whether or not the best interest and welfare of the minor require that the appropriate party be informed in special circumstances."

OTHERS who testified in favor of the bill included the state Department of Health, the American Civil Liberties Union, the National Organization for Women.

Lorraine Stringfellow, professor of maternal and child health at the university, said from 1973 to 1976 women 17 years and younger had 30.9 percent of live births.

They also had 43.6 percent of the total deaths and 33.8 percent of the total reported pregnancies, she said.

Bailey H. Center, executive director of Hawaii Planned Parenthood, said teenagers made up almost 34 percent of the clients served there.
Teen-ager Relations Bill Gets Strong Backing

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“Certainly the pressure of some
who would keep health and sex
education out of our schools results
in uninformed youngsters experi-
menting with their lives and un-
aware of the risk of pregnancy which
surrounds them,” he said.

CENTER SAID the present law is
not clear on the provision of services
to adolescent patients.

“As a result, the few providers
who are ch-v-y identified by the
young population as willing to pro-
tect patient confidentiality find
themselves at great demand.”

He said the proposed bill is good
because it clearly establishes that
sexually active minors “should be
able to receive contraception without
endangering their confidentiality un-
less the physician or counselor feels
there is a need to involve another
party.”
Senate panel buries privacy-rights bill
OKs spending limits, ethics measures

By JENNY HARRIS

The Senate Judiciary Committee last night approved a long list of bills that would put into effect constitutional changes on state spending limits, government ethics and tax rebates.

But the panel held up a measure to carry out constitutional change relating to right privacy.

Many of the bills approved by the Judiciary Committee must still be considered by the Senate Ways and Means Committee. The rest face a final vote in the Senate and further consideration in the House.

The major package approved last night deals with the Constitutional Convention’s attempt to place limits on how much the state can spend.

In general, the legislation would create limits that could be broken only with substantial public notice and discussion.

Growth in state spending could not exceed the percentage change in the state’s economy over the previous three years as measured by personal income.

Either the governor or the Legislature could call for spending above that amount if there were sufficient cash in the till, but a public statement of how much extra would be spent and the reasons would be required.

Another bill would hold spending to available resources. The spending limit conceivably could be considerably less than actual tax take.

In case of a surplus, a further measure approved by Judiciary Committee last night would allow a tax rebate or credit.

Committee members speculated, however, that the practical effect of the rebate provision would be to encourage the Legislature or the administration to spend right up to the limit.

The ethics bill would establish a code of ethics for all public officials and candidates for office. It would require financial disclosure from candidates but would not require disclosure from a candidate’s spouse.

Another bill approved last night would prohibit grants of state money to private groups unless providing grants suited a public purpose.

As approved by the committee, a request for public money would first be reviewed by the agency with jurisdiction over the matter. The bill then would be submitted to the Legislature for study and approval or disapproval.

The only bill turned down last night was a proposed privacy law. The committee heard overwhelming testimony against the bill as proposed during an earlier hearing.

The bill will be reviewed before another measure is introduced next year to put the constitutional mandate on privacy into effect.

Among other constitutional amendments, bills approved last night were ones providing for a formal revenue-estimating committee, a review commission, a state motto, a “plain language” requirement in government documents and nonpartisan recognition of Kamehameha the First’s “law of the splintered paddle” as symbol of government concern for public safety. 

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Easy Does It

on Right of Privacy

Government agencies and the news media made common cause last week. They asked that the Legislature "go slow" in writing a law to implement the Right of Privacy amendment that was part of the 1978 Constitutional Convention package.

No one objected to the essential goal of affording reasonable privacy to all citizens.

Rather emphasis was placed on two major pitfalls:

- The right to privacy must somehow be balanced against the public's right to know.

- Implementation should seek to avoid adding cumbersome new reams of red tape to government bureaucracy or flooding the courts with litigation.

Five different branches of the state government and the Honolulu Police Department expressed fear of the red tape that could result from well-intended but badly written rules. So did the Chamber of Commerce of Hawaii.

News media focused on the "chilling effect" overzealous application could have on investigative reporting and the public's right to know.

Just last October, the Arizona legislature had to be called into special session to repeal a portion of a criminal code effective Oct. 1 that was interpreted as blacking out reporting of crime news.

Hawaii had a similar experience in 1974. A law intended to prevent credit bureaus and prospective employers from abusing official police records relating to innocent persons was interpreted as a gag on the reporting of any criminal case before its final disposition by the courts. Until a federal court invalidated the law, police closed their arrest records to the press and the courts would not release grand jury indictments.

It is easier to understand that there must be a balance between an individual's right to privacy and the public's right to know than it is to write such a balance into law.

We think the state Senate's Judiciary Committee chairman, Dennis E. W. O'Connor, has decided wisely to wait until next year before final action on a privacy law. This will allow time for more careful weighing of the pros and cons in interim study between the 1979 and 1980 legislative sessions.
Testimony outlines potential perils of right-to-privacy bill

SAT FEB 10 1979 / 9:00 AM

By JERRY BURRIS
Advisory Editor, WAC

It will take some time to transform a new Hawaii constitutional "right to privacy" into workable law. State Senate Judiciary Chairman Dennis O'Connell said yesterday.

O'Connell said those who testified on a privacy bill that he intends to seek an interim study of the matter rather than push through a law this session.

In the House, Judiciary Chairman Dennis Yamada said he agrees with O'Connell about the need for interim study.

"Because of its far-reaching effects on agencies...we should go into the interim," Yamada said.

Virtually everyone who testified on the bill - patterned after the federal right-to-privacy law - opposed the measure. This included representatives of new media, the Honolulu Police Department and state officials such as the attorney general and the director of regulatory agencies.

The proposed bill, they said, would be unwieldy, expensive and would work against the public's right to know.

Although O'Connell favors the interim study on the new constitutional right, he said the Legislature will have to come up with some kind of statutory protection before the issue gets into the courts. Without a law, he noted, the state Supreme Court would end up deciding what is private and what is not.

"Obviously, this is something we're going to have to work on in the interim," he said.

"We can't simply use the federal privacy act. We'll have to draft our own law on the right of privacy, drawing from every jurisdiction. But if we don't act, this can take the right of privacy into the courts.

Some of the strongest arguments against the proposed privacy legislation came from the attorney general's office. Deputy Attorney General Michael Lilly said the bill is vague and, over-breed, burdensome and time-consuming, expensive, of limited value to the public, will erode law enforcement and will not achieve an open government.

This last concern was highlighted by media representatives who testified.

Said Honolulu Advertiser Editor in Chief George Chapin:

"The bill, if it is adopted in its present form, would, in my judgment, guarantee an institutional nervous breakdown in virtually every state and county agency, throttle the public's First Amendment right-to-know, create endless years of legislative and judicial combat and build an atmosphere of substantial public bewilderment.

"Hawaii would have not a privacy law, but a secrecy law."

Marcia Reynolds of the Big Island Press Club said the legal sanction against unauthorized release of information would have a chilling effect on newsgathering.

"We fear that the free flow of information will be inhibited because government agencies, departments and employees are subject to criminal penalties for violating this law," she said.

"When there are doubts about what information should be released, the tendency will be to keep records closed because of the possibility of criminal liability."

The Honolulu Police Department, meanwhile, said the bill could end up restricting the flow of information between government agencies and thus hamper law enforcement.

Federal agencies have experienced these problems under the federal law, said Capt. David Husa of the research and development division.

A.A. "Bud" Smyser, editorial page editor of the Honolulu Star-Bulletin, warned that the measure would restrict the flow of information not only between law enforcement agencies but between the justice system and the general public.

That's what happened in other states which enacted generally worded privacy laws, he said.

In Arizona, a new criminal code which classified "any confidential report or record compiled by a law enforcement agency pursuant to an investigation" prompted law enforcement officials to withhold even the most basic information from the news media, Smyser said.

It took a special session of the Arizona Legislature to correct the matter he said.

"It is our opinion that a similar "muddled" result, though not necessarily in the criminal context, conceivably could occur here in Hawaii unless the Legislature proceeds cautiously," he said.
For Interim Studies

Senate to Defer ‘Privacy’ Bill

SAT FEB 10 1979

By Stirling Morita
Star-Bulletin Writer

Passage of a controversial Senate bill to implement a constitutional privacy amendment probably will be held up until next year’s legislative session for further study, Sen. Dennis E.W. O’Connor, Judiciary Committee chairman, said yesterday.

His comments came after a committee hearing in which numerous state officials, news media representatives and others opposed the vagueness and potential effects of the bill, patterned after the federal Privacy Act of 1974.

McKee Lilly, deputy attorney general, wasn’t the committee that the bill is vague, would be administratively burdensome and overly expensive, will not achieve open government, would erode law enforcement powers and have “undesirable legal implications.”

O’CONNOR TOLD reporters: “It’s obvious that we’re going to have to work on it in the interim between sessions.”

Interested persons will be invited to help rework the legislation so it will be attuned to local standards, O’Connor said.

The State Constitutional Convention did not place any time limits on the Legislature to act on the amendment, which reads: “The right to privacy shall not be infringed without the showing of a compelling state interest.”

The bill sets up numerous records disclosure restrictions and would require outsiders seeking state or county agencies’ records involving individuals to receive permission from the persons, unless they are “routine use” records.

Throughout the hearing, O’Connor noted his fear that if the Legislature does not act to set up privacy definitions, the court system will start making its own privacy decisions, as in Alaska where the court ruled, under a privacy amendment, that persons could smoke marijuana in their own homes.

LILLY PREDICTED that because the bill is vaguely worded, “any portion which is not precisely drawn will be struck down.” He said experience from federal Freedom of Information Act indicates that the Senate bill would not really open up the government process.

“It should be remembered that the Hawaii constitutional right to privacy is self-executing and thus will be judicially tested and implemented on a case-by-case basis,” Lilly said.

“Because of this, the Legislature first enact a general provision against abridgment of the right to privacy for their review.”

Concerning correction of individual records, the state government may be placed in a “perplexing situation” on how much investigation is required versus government superficial acceptance of an “individual’s self-serving statements.”

Administrative costs would be high, and staff would be diverted from their regular jobs to comply with the bill’s requirements, Lilly said.

TESTIFYING EIGHTER against effects or provisions of the measure were the Honolulu Star-Bulletin, Honolulu Advertiser, Big Island Press Club, Chamber of Commerce of Hawaii, Honolulu Police Department, state Office of Consumer Protection and the state Department of Regulatory Agencies, Health, Accounting and General Services and Taxation.
In Privacy Bill

Editors Fear Loss of Right to Know

FEB 9 1979

A.A. "Bud" Smyser, Star-Bulletin editorial page editor, told the state Senate Judiciary Committee today that a bill to implement a right-to-privacy amendment in the constitution could needlessly hamstring journalism and the public's right to know.

Similar views were expressed by George Chaplin, editor-in-chief of the Honolulu Advertiser.

"If the Legislature adopts the measure, "Hawaii would not have a privacy law, but a secrecy law," Chaplin said.

Both editors advocated a slow, thorough review of the proposed legislation and offered to assist in ironing out potential problems in the measure.

Anthony Sousa, representing the Chamber of Commerce of Hawaii, said additional costs, to carry out the legislation, are not warranted to enhance privacy rights already spelled out in the U.S. Constitution.

All three men said, in testimony prepared in advance of today's hearing, that although they endorse the concept of right to privacy, the bill could have unintended or far-reaching ramifications.

THE BILL WAS drafted to carry out the amendment, approved by the voters last November, requiring that "the right to privacy shall not be infringed without the showing of a compelling state interest."

A major provision in the bill would require outsiders, requesting to see state or county agencies' records involving individuals (corporations also have been defined as individuals) to get the permission of the persons, unless they are "routine use" records.

Smyser told the committee that a Constitutional Convention committee report included wording for protection of "individuals from "public disclosure of embarrassing facts."

"We submit that many facts that belong in the public realm may be embarrassing to someone, but nonetheless deserve to be made public," Smyser said.

"We still fear that legislative implementation of the right to privacy amendment may unnecessarily restrict not only the capability of the news media to play a watchdog role for the public, but even more importantly, place severe limitations on the public's right to know."

NOTING THAT HE believes the bill may be interpreted to "impede access to information that is essential to the press in its day-to-day reporting of the news," Smyser said legislators might benefit from the experience of the Arizona state legislature in dealing with disclosure of confidential police investigation reports.

Arizona law enforcement agencies interpreted the statute "very narrowly" and withheld "even the most basic information from the news media," Smyser pointed out.

Legislators had assured the media that the provision was not meant to cut off the flow of information on criminal acts and it took a special session of the Legislature to repeal the provision, he said.

POINTING OUT that national awareness of individual privacy dates back to the beginning of the nation, the Advertiser's Chaplin said the proposed law fails to say that the right of a free press is "clearly just as fundamental as the right of privacy."

Chaplin said the bill, unlike the federal Freedom of Information Act, does not include the "need and right of journalists, scholars and others to obtain relevant information about government policies and actions from official agencies."

Referring to the exemption of "routine use" records, Chaplin said, "This vague definition could mean that state administrators would be able to disseminate information when it suits their purposes, but refuse to release information which might prove embarrassing or worse to the state agency of agencies involved."
Lack of police data clogs criminal

The lack of police data is causing delays in the investigation of criminal cases, according to police officials. The Honolulu Police Department has received numerous cases from the Criminal Injury Compensation Commission, but has been unable to release data due to lack of information.

"We have been waiting for over a year to receive the information," said Detective Andrew Chang. "We need to know the names of individuals involved, the dates of incidents, and other crucial details." He added that the department has been unable to provide the necessary information due to the lack of data.

The commission, which awards compensation to victims of criminal activities, often relies on police reports for key information. Without the necessary data, the commission is unable to make decisions on compensation.

"We have been stalling on several cases," said the commission's director, "and we need the police to provide us with the necessary information as soon as possible." He added that the commission is able to award compensation to individuals who have been injured, killed, or whose property has been damaged.

The situation has led to increased frustration among commission members and victims. "We need to see progress on this issue," said one member. "We can't continue to wait for the police to provide us with the necessary information."
Big Success of Con Con Is Surprise

In what came as a surprise even for delegates, all amendments to the state's constitution approved by the Constitutional Convention were accepted by Hawai'i voters yesterday. Four amendments—the right to privacy, the transfer of real property taxes to counties and two of the Hawaiian Affairs proposals—ended up passing by relatively small margins. But all others were approved overwhelmingly.

Even the far less controversial 1968 Con Con did not get the same sweeping approval—the 1968 version had one of its 22 proposals to give day-care workers the voter defeated. There was no overwhelming "blanket no" vote yesterday, as some had predicted. In fact, there were more "blanket yes" votes than the opposite.

And only about 16 percent of the voters did not vote on the amendments at all or spoiled their ballots, far less than same at the convention had feared.

As a result, Hawai'i's constitution got its most extensive rewrite yesterday since it was first adopted in 1919.

Now are the open primary, a right to privacy, a spending limit for state government, a sweeping series of provisions dealing with Hawaiian, a new appeals court, a judicial selection commission, partial public financing of elections, a two-term limit for the governor and a number of provisions dealing with the environment.

The Legislature has a large task ahead of it in implementing the proposals, as many of them call for extensive work by the House and Senate.

And several of constitutional charges approved yesterday are likely to end up in court facing constitutional or other legal challenges.

About 11 percent of those who cast un-paired Con Con ballots yesterday voted a blanket yes. Twenty percent voted a blanket no, and the other 10 percent voted in Part B of the ballot, only voting against the proposals they opposed.

In 1968, which had a ballot structured in the same manner as this year's, 32 percent voted blanket yes, 18 percent voted blanket no, and the remaining voted selectively.

Proposal 30, the constitution's code of ethics, received 178,984 votes, more than any other item on the ballot. Proposal 37, which requires the
Right of Privacy vs. Freedom of Press

A decision just handed down by the New York Court of Appeals pertains to the proposed constitutional amendment on the right of privacy on the ballot Tuesday.

In that ruling, the court denied an attempt by Monroe County officials to block sister newspapers of the Star-Bulletin in the Gannett group from inspecting county employee lists.

The newspapers had asked to inspect the lists in accordance with provisions of the freedom of information law in order to determine how many persons had been laid off during a budget cutback.

The county refused the request. It argued that disclosure of the names would result in hardship for the persons named and that it would constitute invasion of privacy.

In this newspaper's statement of editorial positions on the Con Con amendment proposals, we stated that we oppose the privacy amendment because there is a danger that it could be used to stifle criminal investigations and investigative reporting.

The New York case is an example of how conflicts can arise between claims of privacy, restricting disclosure of information, and the needs of the press in order to perform its function under the First Amendment guarantee of freedom of the press.

The right to privacy is accepted legal doctrine, but the meaning of that right in relation to other rights and problems is still being defined through court decisions. Adopting the proposed privacy amendment could result in erection of undesirable obstacles in the way of the press' access to information the public ought to have. It should be rejected.
Historically, the development of the Bill of Rights in the United States Constitution was an affirmation of an individual's right to privacy. In the Declaration of Independence, the Founding Fathers declared that all men are created equal, and thus, the right to privacy is a fundamental human right.

The right to privacy is not an absolute right, but it is a fundamental right that should be protected. The Constitution of the United States recognizes the right to privacy in the Fourth Amendment, which prohibits unreasonable searches and seizures.

The right to privacy is a vital right that protects individuals from government overreach. It allows individuals to engage in private activities without interference from the government.

Privacy Amendment Opposed

By Kinai Boyd Kamali

The right to privacy is a fundamental right that is protected by the Constitution of the United States. However, the proposed privacy amendment to the Constitution would threaten this right.

Privacy Amendment: The proposed amendment to the Constitution would allow the government to conduct searches and seizures without a warrant.

The right to privacy is not an absolute right, but it is a fundamental right that should be protected. The Constitution of the United States recognizes the right to privacy in the Fourth Amendment, which prohibits unreasonable searches and seizures.

The proposed amendment to the Constitution would allow the government to conduct searches and seizures without a warrant. This would threaten the right to privacy and could lead to government overreach.

In conclusion, the proposed privacy amendment to the Constitution would be harmful to individual rights and liberties. It is important to protect the right to privacy and to prevent government overreach.

Kinai Boyd Kamali
Prosecutors Score
Two Amendments

WAILEA, Maui — Hawaii’s prosecuting attorneys are against proposed amendments 2 and 3 to the state Constitution and are urging islanders to vote the changes down in next Tuesday’s election.

Maui Prosecuting Attorney Boyd P. Mossman said yesterday the prosecutors of each of the state’s four counties are unanimously opposed to the amendments.

In a statement issued in behalf of his colleagues, Mossman, president of the Hawaii Prosecuting Attorneys’ Association, said if approved by the electorate the proposed amendments would make it more difficult for law enforcers to cope with the criminal problem.

He said the prosecutors want the electorate to “show its concern for the menace of crime in our state” by voting “no” on the amendments.

“TO DO SO WILL enable us to continue our efforts to protect you,” he said.

He said he fails to understand why the Constitutional Convention decided to place the items on the ballot “at a time when overwhelming public concern is focused upon crime in Hawaii.”

Both amendments which relate to an independent grand jury counsel and privacy rights will place “new obstacles in the path of those responsible for protecting the people from the predators of society,” he said.

“Notwithstanding the criticism directed at the grand jury system by those who seem to have interests other than the public’s safety, the grand jury system is a necessary means by which the prosecutor must bring a felon to answer for his crimes,” he said.

AS PROPOSED BY the convention the amendment seeks to provide the grand jury with “independent” non-governmental counsel.

As structured now the grand jury is a “vital instrument in assembling complicated evidence and persuading reluctant witnesses to come forward with testimony,” Mossman said.

He described the grand jury as vital to the people’s interest in uncovering illegal activities and searching for truth in judicial proceedings.

“To place in the grand jury a supposedly independent counsel, as amendment 2 seeks to do, might well place in the grand jury a person who would directly or indirectly obstruct this important function,” he said.

REFERRING TO the right to privacy article covered by amendment 3, Mossman said the article is not needed because the state Constitution now preserves this right.

“To tamper with it to the benefit of criminals and detriment of the people cannot be condoned,” he said.

As written, the article seeks to confirm the right of the people to privacy which shall not be infringed without the showing of a compelling state interest.

“The sophisticated techniques of modern day criminals require that privacy, like all the rights we enjoy as citizens, be tempered to protect all the people,” Mossman said.

BUT HE SAID the recent “Project Hukilau” in Honolulu involving a roundup of burglars would not have succeeded if crime fighters had to contend with amendment 3.
Bar board takes stand on 6 Con Con changes

The Hawaii State Bar Association's executive board is recommending against Constitutional Convention proposals relating to adverse possession, the right to privacy and the right to sue for a clean and healthy environment. The association said the amendment would "give a small minority tremendous power to stop public or private improvements" which might be favored by most citizens.

The association's strongest opposition is leveled at the convention's proposal to limit the use of adverse possession, which allows a person to gain title to land if occupied for a number of years.

The association said it has been "suggested that the purpose of Proposal 32 is to prohibit the occasional use of the law of adverse possession against Hawaiian kuleanas — small parcels of land awarded to the commoners at the same time of the Great Mahele — by a person who acquires possession of a kuleana knowing that there are missing links in the title."

The group said the Legislature could prohibit that practice by law. The constitutional amendment, the bar association stated, would completely eliminate the protection of the adverse possession law for the those who legitimately gain possession of land thinking it is their own and who later find the title is no good because of a technical quirk somewhere in the chain of ownership transfers over the years.

In a statement to members, President Daniel Case said the board took positions on only six of 34 Con Con proposals because these were subjects within the expertise of lawyers and not "matters of pure political philosophy."

The association is supporting three proposals: one to give grand juries independent counsel who would provide them with impartial legal advice; another that would make such changes as provide for an intermediate court of appeals, a new judicial selection system and a new system to receive complaints about judges; and a proposal to conform Hawaii and federal income tax laws.

In opposing the convention's right to privacy proposal, the association said the amendment "will generate years of uncertainty and litigation before its full meaning is defined by the courts. The Bar Association also believes that both federal and state constitutions presently protect the right to privacy."

On its opposition to the proposal which would establish the right to sue for a clean and healthy environment, the association said the amendment would "give a small minority tremendous power to stop public or private improvements" which might be favored by most citizens.

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HILO — The Big Island Press Club yesterday announced its opposition to a proposed constitutional amendment dealing with the "right to privacy."

The opposition was announced by President Marcia Reynolds, a Hawaii Tribune-Herald reporter, who said the club's board of directors unanimously opposed the proposal because of alleged vagueness and concern it will conflict with the rights to free speech and press.

"The press club believes the right to privacy is adequately covered in the present Hawaii Constitution under a section dealing with 'searches, seizures and invasion of privacy,' which follows the language of the U.S. Constitution," Reynolds said.

She said a similar law in Alaska has hampered law enforcement officials in investigating crimes and prevented departments from sharing data normally exchanged between governmental agencies.

Part of the press club's fears over the proposal stems from the Act 45 problems experienced in 1974, Reynolds explained.

"That law was approved with good intentions, but when put into practice, it prevented police from giving out information about people arrested and charged with criminal violations," Reynolds said.

"Although neither the police nor the press favored this law, it was strictly followed by the Hawaii County police department because it was on the books."

The unintended problems stemming from Act 45 were corrected in the next session of the legislature. But corrective action on problems from a right to privacy amendment would take at least 10 years to achieve.

"While the amendment may be well-intended, it gives an open-ended mandate to the state Legislature to close records to the public and press under the guise of protecting individual privacy," the press club statement said.

"We believe the amendment will stifle investigative reporting and the free flow of information. The amendment and the committee report on the proposal (at the Constitutional Convention) take a very casual attitude toward the public's right to know, which we believe is basic in a free democracy."
Proposition will give individual the right to proclaim: 'mind your own business'
Dangers Are Seen in Privacy Clause

TUE SEP 19 1978 SB H

The right of privacy is a concept that has developed growing significance in recent years.

Courts have held it is embodied in the constitutionally protected rights to life, liberty and the pursuit of happiness.

Although protection against invasion of privacy is already specifically provided for in the Hawaii State Constitution, the Star-Bulletin initially did not oppose Con Con's effort to strengthen this right by adding a further privacy section to the Constitution.

However, the committee report language supporting the new right as well as remarks made by various delegates on the floor of the convention now cause us to fear for free speech and press.

Some of the justifications for the new right to privacy are asserted so strongly that they seem to override free speech and press. Should this be the case, the community will be the loser. Investigative reporting could be stifled. Even the presentation of information readily available on public records might be challenged.

The prospect of media intimidation is substantial. We mean it literally that if we at the Star-Bulletin wanted to continue the kind of reporting on organized crime we have done recently, we might need to reduce our reporting staff in order to hire more lawyers to defend us against privacy suits.

Less affluent media simply might be muzzled.

Yesterday a meeting was held of media representatives from the major daily newspapers, television, radio, local magazines and the two national press services.

A letter was forwarded to Con Con, signed by all present, asking for some action before adjournment to assure future interpreters of Con Con's work that there is no intention to infringe on free speech and press.

This could soften (though hardly end) the threat that the public's right to know will be nibbled away.
Media Urges Clarification of ‘Privacy’

TUE, SEP 2 1978 SB M

By Lee Gamens

Star-Bulletin Writer

About 15 representatives of the state’s major media outlets gathered for a rare joint meeting yesterday to work out a way to get the Constitutional Convention to raise its interest in approving a constitutional amendment protecting the right of privacy.

After the meeting, 13 of those attending signed a letter to the chairman of the committee that first approved the amendment. The letter was written by George Chaplin, editor-in-chief of the Honolulu Advertiser.

The letter was delivered to William Weatherwax, chairman of the committee on the Bill of Rights, Speech and Elections, and said the group was “deeply concerned with the potential threat to free speech and press posed by the right-to-privacy proposal.”

“If it is not made clear that there is no intent on the part of the framers of the proposal to infringe on the first amendment, the door is needlessly left open to ambiguity, uncertainty and probably continued legal controversy in the years ahead,” the letter stated.

The 12-PAGE LETTER was signed by representatives of the Star-Bulletin, the Honolulu Advertiser, the Hawaii Tribune-Herald, the Associated Press and United Press International, television stations in KGMB, KHON, KHJJ and KHET, radio station KIVN, Honolulu Magazine, Trade Publishing Co. and Hawaii Business Magazine. The meeting was held in the Star-Bulletin’s executive conference room.

Those present at the meeting want the convention to pass a resolution specifically stating that it did not intend the amendment to infringe on freedom of the press.

Yesterday afternoon, Weatherwax said he did not oppose such a resolution and would explore the possibility of having one introduced.

The PRIVACY AMENDMENT was given its final convention approval yesterday, and will be put on the Nov. 7 ballot for voter action. It reads: “The right of the people to privacy is recognized and shall not be infringed. The Legislature shall take affirmative steps to implement this right.”

On Friday the convention voted down a change to the proposal that would have established the right to privacy “with due regard for the interests of free speech and a free press.” That language had been suggested by Arthur Nailer, a Harvard Law School professor who deals in privacy law, and was introduced at the convention by Iolani Hale at Chaplin’s request.

Privacy is already mentioned in the Hawaii constitution in connection with illegal searches and seizures, but the Hawaii Supreme Court here has said the search, which deals with criminal law, does not elevate the right to privacy to the same status as other rights, such as those involving the press, speech and religion.

THE STATUS WOULD be achieved if the amendment is ratified by the voters. If approved, the amendment is expected to have ramifications in several areas of law. The state’s drug laws are frequently cited as an example.

Alaska has had similar language in its constitution since 1972, and in 1973 the Alaska Supreme Court said that persons have the right to smoke marijuana in the privacy of their own home. Many people at the convention expect the Hawaii Supreme Court to take a similar approach.

There are also expectations that the amendment would require the Legislature to pass laws regulating credit bureaus.

But the concerns of the media representatives yesterday was with the impact the amendment would have on the operations of the press. The fear was repeatedly expressed that the amendment could lead to “harassment” lawsuits claiming invasion of privacy from people who have had stories written or broadcast about them.

THE ASSOCIATED PRESS, one of the major wire services that provides national news to the local media, said in a response to a query from the Star-Bulletin that the “major implication” for the press is the privacy amendment in Alaska: that the press has not been unable to cover a Uniform Public Records Act passed by the Legislature.

Christopher S. Dix, attorney for the Hawaii Newspaper Agency, took the group that the committee report accompanying the amendment did not include any statement in it that the proposal was not intended to infringe on freedom of the press.

Cox is often listed as a committee report due to floor debate in attempting to discern the intent of the drafters of a law or action of the legislature.
Right-to-privacy makes Con Con ballot

SAT SEP 16 1978 AD
By SANDRA R. GURCH

In short, this right of privacy includes the right to an individual to resist the world to mind your own business.

In order to properly address the controversy about the proposed right of privacy, the legislature must take affirmative steps to implement the amendment.

Christopher Duvall, attorney for the News-Telegram, argued that the language of the amendment had been carefully crafted to ensure the right to privacy.

The amendment, according to Mr. Duvall, had been carefully crafted to ensure the right to privacy, but it also provided for exceptions where the public interest required.

Delegates speaking for the amendment said the added wording was necessary to ensure that the proposed right of privacy would not be used as a "weapon" against the press.

The amendment would also protect the proposed right to privacy in cases where the public interest required.

Delegates supported the amendment based on the need to protect the privacy of ordinary people.
Privacy Proposal Is Approved in Convention

By Leo Gomes
Star-Bulletin Writer

The Constitutional Convention yester-
day approved a proposed new-
section of the Constitution protecting
an individual’s right to privacy, after
a debate over its effects on freedom
of the press and on the state’s
drug laws.

The proposal reads: "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
appropriate steps to implement this
right.

"The language warned the editors
of both major Honolulu daily news-
papers, who mounted a small last-
minute lobbying effort to have the
proposal changed.

At the request of newspaper repre-
sentatives, Helena Hale tried to
amend the proposal by adding words
with due concern for the interests
of free speech and press" to its
beginning.

THE LANGUAGE was intended to
draw concerns that the privacy state-
ment could restrict the information
that newspapers can publish and
would lead to numerous lawsuits
challenging invasion of privacy.

Hale said in offering the revised
wording that the original proposal
could create substantial problems for
the press.

Noemi Campbell said the original
proposition could be used to "harass"
reporters, and said that "if the right
to freedom of speech and freedom
of the press is jeopardized, that jeop-
darizes the rest of us."

Other delegates said the attack of
newspapers to write about organ-
ized crime could be hampered by the
proposition if it is approved by the
voters, on Nov. 1.

BEVERLY HINO, who submitted the
original proposal, spoke against
Hale’s amendment and said that
"any section of the Constitution is
subject to abuse." He said that "to
accommodate the press" by chang-
ing the proposal could lead to adding

A proposal can only be amended
on third reading if no delegate ob-
jects to the amendment.

Wallace Westerwax, chairman of
the committee that reported out the
proposal, said it "was necessary to
have the language as broad as it is."

He said the new section of the Con-
stitution would require a "balancing
in process," and that most "meat"
would be later added by the courts.

WESTERWAX said he shared
some of the concerns expressed by
other delegates but said he thought
they were "ungrounded, because the
rights of the press would still be re-
tained and maintained. That is not
intended to deter or diminish the
right of the press.

The comments were made in a dis-
cussion that the courts may later
look to in deciding what the effect of
the proposal will be. Several dele-
egates, like Bill Burgess, said on the
record that the proposal was not in-
tended to hamper the press.

After Hale lost her effort to amend
the proposal, she added that it be
turned down completely, but lost in
that effort by a 60-39 vote.

In discussing the objections that
were raised by newspapers, Pamela
Anast said the convention should not
decide a proposal involving "this
basic right that we all should enjoy"-
"because of the hardships it would
cause on a few."

MALE WHO HAD earlier supported
the proposal because of her objec-
tions to the state’s drug laws, said it
"creates an umbrella that everyone
can find room under," and also
said that "maybe we really don’t
know" what the proposal would do.

Some delegates also objected to
the proposal because of the rami-
fications it may involve in the state’s
drug laws. Alaska has sim-
ilar language in its constitution, and
the supreme court there ruled it in
striking down the state’s marijuana
laws.

Floyd Putham said the proposal
ought to be used "to promote the drug
vulture." And in response to the
charge of another delegate that
the proposal was a "simple little
proposition," he called it a "simple
little very complex proposition with
ramifications we can’t all agree on."

HE SAID DELEGATES should
vote it down "if you believe in taking
a tougher stand on drugs and an
organized crime."

Other delegates said outlawing
the personal use of marijuana violates
an individual’s privacy, and that the
proposal would not encourage the
use of drugs.

In addition to the press and the
state’s drug laws, the proposal also
could touch on other areas of law. It
may, for example, require the Legis-
lature to enact laws regulating
credit bureaus, where some have
said can violate an individual’s
privacy through large amounts
of information they accumulate on
computers.

MAKING A POINT—Debate continued at the Constitutional Convention yesterday, with (from left) Robert
Terha, John Wehwe, Laura Ching and Bill Putha engaged in thoughtful discussion. —Star-Bulletin Photo by Ken
Salohano.
Convention
Okays Right
to Privacy

By Lee Gomes
Star-Bulletin Writer

The Constitutional Convention today approved a proposed new section of the constitution protecting an individual's right to privacy, after a debate over its effects on freedom of the press and on the state's drug laws.

The proposal reads: "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 convention voted down an amendment that would have added the words "with due concern for the interests of free speech and press" to the beginning of the proposal. The language had been suggested by representatives of Hawaii's two major daily newspapers, who had lobbied yesterday and today to clarify the proposal's wording.

Delegate Helene Hail said in defense of the revised wording that the original proposal could cause substantial problems for the press.

Delegate Naomi Campbell said the original proposal could be used to "harass" reporters and other decision-makers said the attempt of newspapers to write about organized crime could be hampered by the section if it is approved by the voters on Nov. 7.

Hail, who submitted the original proposal, spoke against Hail's amendment and said that "Any section of the Constitution is open to abuse." She said that "to accommodate the press" by changing the proposal could lead to adding "doctors and nurses, schoolteachers, aspiring political candidates, salespersons" and others to the list.

Hail said: "If the press is truly concerned that the privacy proposal would require closer review of the news they print about ordinary people, I am elated because the desired effect is taking place even before third reading," which will come next week and at which time the proposal is expected to receive final convention approval.

A PROPOSAL CAN only be amended on third reading if no delegate objects to the amendment.

Wallace Weatherwax, chairman of the committee that reported out the proposal, said it would require a "listing in process," and that more "meat" would be later added by the courts. Weatherwax said he shared some of the concerns expressed by other delegates but said he thought they were "unfounded," thought the rights of the press would still be retained and maintained. This is not intended to delete or diminish the rights of the press."
How private is privacy?
Con Con panel can’t say

By SANDRA S. OSHIRO
Adviser Government Bureau

Will a proposal to establish a right to privacy in the state Constitution allow a person to smoke marijuana without fear of breaking the law?

The answer: It will be up to the courts to decide, according to the chairman of the Constitutional Convention committee that recommended the proposal.

That was a sampling of the discussion on the privacy proposal that was endorsed by the Con Con yesterday.

Although there were no clear-cut answers to the actual effects of the proposed change, a majority of the delegates voted to reject a suggestion to delete it from the convention’s recommended changes to the Bill of Rights.

No one could say for sure what effects the provision would have on criminal enforcement procedures, access to information and other matters where privacy may be at issue. If the proposal is adopted by the voters, the courts would need to decide exactly what the right to privacy would cover.

The proposal, introduced by delegate Akira Hino, would establish a section in the Bill of Rights that the “right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”

Based on similar wording in the Alaska Constitution, the courts there struck down anti-marijuana laws, but upheld statutes relating to cocaine use.

The proposal would not replace another provision already in the Hawaii Constitution prohibiting unreasonable searches and invasions of privacy, but would expand the individual’s right to autonomy, according to supporters.

According to the committee report on the Hino proposal, the intent is to protect an individual from an “invasion of his private affairs, public disclosure of embarrassing facts and publicity placing the individual in a false light.”

Delegates supporting the proposal said that an individual should have the right to protect information about himself or herself that could be accumulated in computers and abused in some fashion. Another point raised in support was that the privacy clause was needed to stop police helicopter searches.

One opponent said it was not precise what problems would be solved by including the privacy provision in the Constitution. Noting that the proposal would also direct the Legislature to take affirmative steps to implement the new right to privacy, the opponent said that it would increase — not decrease — privacy invasions by government.

Before voting to support the privacy proposal, the delegates also voted against a provision that would have given the public the right of access to public records of the state and counties. Supporters said it would give the public the right to inquire into documents not now available that might affect their lives. Sufficient protections could be adopted to prevent abuses, they said.

Opponents argued that the state already has a sunshine provision that allows the public to look at certain types of public records.

In another action, the delegates rejected a proposal that would have eliminated insanity as a defense from the state Constitution. Under the suggested change, insanity would only be taken into account in the sentencing process. Supporters said that the insanity defense was being abused by defendants who are not insane. Opponents said that the area of law involving insanity is too complicated to be tackled by the convention.

The convention agreed to support one proposal that would require that all juries deliberating on a serious crime consist of 12 persons. Advocates of the measure said it would ensure that minority opinions would be heard in jury deliberations, something that they said was not assured with smaller juries.

The matters taken up yesterday can be put to the convention again in a few days, but votes taken in the committee of the whole usually are upheld and generally reflect Con Con’s final action.
Panel Wants Privacy Section Added

A statement on privacy which could affect several areas of law was approved by a Constitutional Convention committee yesterday for inclusion into the state's constitution.

The proposed new section in the document was introduced by Atoka Mine, and reads, "The right of the people to privacy is recognized and shall not be infringed without the showing of compelling state interest. The Legislature shall take affirmative steps to implement this right."

It was approved overwhelmingly by the committee on the Bill of Rights, Suffrage and Elections and must now be accepted by the entire convention before it can be put on the ballot for voter approval.

If put into the constitution, the privacy statement could affect credit bureaus, marijuana laws, the press and many other areas.

The right to privacy is already recognized in both the state and U.S. constitutions, either directly or through court interpretations.

THE STATE CONSTITUTION now has a statement on privacy, but it is contained in the section on unreasonable searches and seizures, and the Hawai'i Supreme Court has ruled that the provision does not elevate the right of privacy to the equivalent of the First Amendment rights of religion, speech, press or assembly.

Adding the statement approved by the committee yesterday would, in effect, recognize privacy as important enough to merit a separate section in the constitution.

A committee attorney emphasized that constitutional amendments of this nature involve many "grey areas" of the law that must be eventually settled by the courts on a case-by-case basis. Therefore, he said, it is difficult to predict with certainty the exact consequences of adding the section.

He explained, though, that the section might, for example, require the Legislature to enact laws regulating credit bureaus.

There has been a growing concern in recent years about the increasing use of computers by such agencies, and the invasions of privacy that might result from information being collected by an individual without that person's knowledge.

Some of the state's drug laws could also be affected by the change, the attorney said.

In the area of laws relating to the press, the right to privacy of citizens who are not regular newsmakers was being considered in court across the country. Unlike laws: where the issue is well-defined, it's a matter concerning the amount of privacy that citizens or others from the press is still being examined by the courts.

Adding the privacy section to the constitution might give an additional argument in those suing a newspaper or television station for an invasion of privacy, the attorney said. But he said he expected the press' First Amendment right to outweigh those contained in the privacy statement.

ALASKA has similar privacy language in its constitution, and that state's Supreme Court declared Alaska's marijuana laws unconstitutional because of the section. The Alaska court ruled at the same time, though, that laws against cocaine were still constitutionally acceptable.

Since the privacy section would require that there be an overriding state concern before any law affecting an individual's privacy be allowed, the state's marijuana laws could possibly be overturned, he said.

The area of laws relating to the press, the right to privacy of citizens who are not regular newsmakers was being considered in court across the country. Unlike laws: where the issue is well-defined, it's a matter concerning the amount of privacy that citizens or others from the press is still being examined by the courts.

Adding the privacy section to the constitution might give an additional argument in those suing a newspaper or television station for an invasion of privacy, the attorney said. But he said he expected the press' First Amendment right to outweigh those contained in the privacy statement.
The city is planning to adopt a new set of rules governing public access to public and private records of city agencies.

The rules were compiled by the city corporation counsel and the Municipal Reference and Records Center under the direction of Managing Director Richard Sharpless. The City Council had passed an ordinance mandating Sharpless to put together the new rules and regulations and he held the first public hearing on them Thursday night, but nobody from the public showed up to testify.

In essence, the rules spell out what are public and private records for all city agencies. They also establish procedures parties can follow to gain access to information.

The regulations call for departments to segregate their files into public and private records and to submit a list of all confidential records to the managing director. The list will include the titles of all confidential records, the reasons for confidentiality, what security measures are used to keep the files secret and “when, if ever, such records would be made available to the public.”

The corporation counsel has said such lists are “consistent with applicable law,” according to the proposed rules.

Only one person testified at Thursday’s hearing. Peter Senecal, management analyst for the managing director, said the city Department of Data Systems objected to the inclusion of the sale or release of names and addresses for commercial and fund-raising purposes as a private record.

“The department,” he said, “regularly receives requests from political candidates for lists of names and addresses. For example, the list of registered voters. Once these are sold, they (the departments) can’t be certain whether they will be used for fund-raising purposes.” Sharpless said the suggestion would be taken under advisement.

The rules and regulations now have to be approved by Sharpless and Mayor Frank Fasi. City agencies will have 90 days to comply, after the rules and regulations are filed with the city clerk.
Report of the Governor's Committee on Public Records and Privacy
Volume IV

APPENDIX L: NEWS ARTICLES ON PUBLIC RECORDS AND PRIVACY

A. Introduction

This appendix collates all newspaper articles on public records and privacy issues found in the two major Honolulu daily papers dating back from the present through 1975. The staff obtained the clippings from the files of the combined library that serves both papers.

The most relevant clippings are briefly captioned below. On the left of each caption are the initials ("AD" for the Honolulu Advertiser; "SB" for the Star Bulletin) of the newspaper presenting the article and the date. Where numerous articles covered the same general issue, such as child care center records, all articles are shown under one caption. The reader is then asked to refer to the clippings in this appendix for the full text. Note that news articles and editorials commenting on the committee's work on this report are also provided for the reader's convenience.

B. Summary of Articles

AD 11/3/87 Editorial: Advocates openness in government, specifically with regard to information on government loan programs.

AD 11/1/87 Acting Governor Cayetano waives attorney-client privilege to release A.G. Opinion re: access to information on government fisheries loan program; and releases loan information.

AD 10/31/87 Current status of government loans to private individuals is not a matter of public record (AG opinion).

AD 10/22/87 Accessibility of a court file containing medicaid records re: a controversial surgical procedure.

SB 10/15/87 Citizen damaged by release of misidentified criminal history; necessity of dual reporting ("Dear Abby").
Accessibility of court documents containing potentially damaging/embarrassing and possibly false information.

Privacy law prohibits the release of names and addresses of public employees for union election.

Letter to the Editor (from Maria Hustace): In support of open government.

Privacy law's prohibition on release of criminal histories resulted in the hiring of a school bus driver with a history of sexual assault.

Editorial: In support of a more open government.

Legislation: Making public officials' qualifications a matter of public record.

Accessibility of business records contained in court documents.

Analysis of Judge Donald Tsukiyama's stance on the public's right to know.

State criticized for misuse of privacy law.

Letter to the Editor (from Michael Lilly): In support of open government and critical of DCCA.

Identity of an informant contained in Heftel "smear" report.

Release and withdrawal of Heftel "smear" report.

Release of confidential investigative report.

Use of confidential documents to defend against sex abuse charges not allowed (U.S. Supreme Court).

Reconstruction of the state privacy law under consideration.

Painters v. DCCA

Accessibility of government documents containing information about private citizens.
SB 11/26/86 Accessibility of civil suit drawn up but withdrawn by A.G.

SB 7/ 1/86 Government use of information originally collected for a different purpose.

SB 2/21/86 Release of government employee salary information by legislators does not violate the state privacy law (A.G. Opinion).

AD 9/12/85 Financial disclosure statements by county employees involved in regulatory functions required.

AD 7/ 9/85 Editorial: raises concern over balance between privacy and Sunshine Laws.

SB 5/ 8/85 New law opens child care center records.
SB 6/14/84
SB 6/25/84

SB 4/24/85 Closed government sabotages itself.

SB 3/27/85 Accessibility of Bank Examiner's reports.

SB 3/22/85 Legislation: privacy code criticized for being overly broad and vague.

SB 3/19/85 Privacy law as it applies to auto license records prevents safety recalls of autos (see: SB 9/5/84 State: pro; City: con).

AD 3/18/85 Editorial: raises concern over balance between privacy and Sunshine Laws.

SB 3/12/85 Legislation: privacy code criticized for being overly broad and vague.


AD 3/ 6/85 Legislation: amendments to privacy code called for.

SB 3/ 6/85 Editorial: raises concern over balance between privacy and Sunshine Laws.

SB 3/ 5/85 Legislation: various issues raised by testifiers.

SB 2/16/85 Editorial: criticizes privacy law for being too restrictive--various examples.
AD  2/16/85 Editorial: calls for privacy reform--various issues raised.

SB  2/ 5/85 Legislation: introduced out of concern that interpretation of privacy law is subject to whim of A.G.

SB  12/19/84 Common Cause/Hawaii calls for balance between privacy and Sunshine Laws--various issues raised.

SB  11/28/84 Editorial: calls for revision of privacy law--raises issue of preschool records as support (see SB 3/27/84).

SB  11/29/84 Privacy law misused (Sunshine coalition).

SB  10/23/84 Use of confidential documents to defend against libel charge.

SB  9/ 5/84 Driver's license data (see SB 3/18/85).

AD  8/28/84 Police use of bugging device upheld by State Supreme Court.

SB  4/ 2/84 Accessibility of proposals for development projects submitted by private bidders.

AD  7/ 9/84 Prisoners' rights to privacy--U.S. Supreme Court rules that they have none.

SB  7/ 3/84 Editorial: Urging Hawaii county police department to open more of its records.

SB  6/23/84 Privacy law used by government agencies to prevent public access (William Cox).

SB  6/ 7/84 Accessibility of information on prisoners being considered for parole.

SB  5/30/84 Use of police tapes as evidence upheld by State Supreme Court (See AD 12/9/83 and SB 11/20/82).

AD  4/29/84 Accessibility of HPD's general department directives.

SB  4/18/84 Accessibility of complaints of police misconduct.

AD  4/ 9/84 Accessibility of Legislature's investigative committee reports.
AD 4/ 1/84 Editorial: Raises concern that privacy law is being misused.

AD 4/ 1/84

SB 3/28/84 Public employee salary information.

SB 3/28/84 Misuse of the privacy law--various examples.

AD 3/27/84 Legislation: Privacy law criticized for being too conservative.

SB 3/27/84 Child care records are open in most states (see SB 11/28/84).

AD 3/21/84 Editorial: State government criticized for being too closed.

AD 3/12/84 State application of privacy law criticized--various examples.

SB 3/ 2/84 Legislation: No guarantee of privacy vs. expectation of privacy (electronic eavesdropping).

3/ 1/84

AD 12/9/83 Police tape recording as evidence not allowed by circuit court (see SB 5/30/84 and SB 11/20/82).

SB 5/30/83 Revision of the state wiretap law.

SB 4/22/83 Accessibility of Legislature's budgetary worksheets.

SB 11/20/82 Use of federal tax records as evidence in court.

SB 10/27/82 Use of confidential records by public officials for private interests.

10/26/82

SB 10/ 2/82 Editorial re: court decisions on police tape recordings as evidence (see SB 5/30/84, SB 9/2/82 and AD 12/9/83).

10/ 1/82

SB 9/ 8/82 Letter to the editor (from Ian Lind): raises a possible example of misuse of the privacy law.

SB 10/15/81 Reagan administration proposal of new restrictions on FOIA.

SB 9/17/81 Series of articles raises various issues.

9/16/81

9/15/81

SB 9/15/81 Editorial: Raises concern that agency procedures discourage public from inspecting records.

-5-
SB 5/15/81  Building permit applications and plans.

SB 3/28/81  Legislation: For the purpose of strengthening the state Sunshine Law by opening legislative committee reports.

AD 3/31/81  Legislation: Dispute over interpretation of Right to Privacy and financial disclosure amendments in the state constitution.

SB 3/7/81  Legislation: Dispute over interpretation of Right to Privacy and financial disclosure amendments in the state constitution.

AD 10/27/80  The identities of police officers named in citizens' complaints are not a matter of public record (A.G. Opinion).

SB 10/22/80  The identities of police officers named in citizens' complaints are not a matter of public record (A.G. Opinion).

SB 8/7/80  Editorial: Advocates adoption of the Uniform Information Practices Code in order to achieve balance between right-to-know and privacy interests.

SB 2/18/80  Legislation: Testimony on several privacy bills raised various issues.

2/16/80  Legislation: Testimony on several privacy bills raised various issues.

SB 1/30/80  The federal privacy and information acts hamper U.S. Secret Service efforts.

AD 1/23/80  Legislation: Testimony on a bill to establish a government records commission raises various issues.

AD 1/10/80  Legislation: Testimony on implementation of the state privacy amendment raises various issues.

SB 10/20/79  Oregon's privacy law makes all criminal justice information inaccessible.

SB 10/5/79  Circuit Court rules that Department of Health files on sewage spills are public.

AD 2/23/79  Legislation: Dispute over whether a change based on the privacy amendment will gut the ethics law.

SB 2/14/79  Editorial: Outlines pitfalls of privacy laws.

AD 2/10/79  Legislation: Testimony raises various concerns over privacy bill.

SB 2/10/79  Legislation: Testimony raises various concerns over privacy bill.

SB 2/9/79  Federal privacy act causes police reluctance to release investigative reports which could support the claims brought to the Criminal Injuries Compensation Commission.

AD 2/2/79  Federal privacy act causes police reluctance to release investigative reports which could support the claims brought to the Criminal Injuries Compensation Commission.

SB 11/2/78 Rep. Kinau Kamalii opposes the proposed privacy amendment.

SB 10/31/78 County prosecutors oppose the proposed privacy amendment.

AD 10/28/78 The state bar board opposes the proposed privacy amendment.

AD 10/26/78 The Big Island Press Club opposes the proposed privacy amendment.

AD 10/18/78 General analysis of the proposed privacy amendment.

SB 9/19/78 Editorial: Critical of the proposed privacy amendment.

SB 9/19/78 The media express concern that the right to privacy will undermine freedom of speech and the press.

AD 9/16/78 Various articles track the development of the state's privacy amendment through con-con.

SB 9/16/78 SB 9/15/78 AD 9/10/78 SB 8/21/78

AD 8/12/78 City adopts rules on access to its records.

SB 2/9/78 AD 7/20/78 Constitutional Convention: media testify in favor of greater access to government needs and the public's right-to-know.


SB 9/15/77 Panel of journalists, lawyers, etc., discuss access to public records.

AD 2/27/77 AD 5/31/77 Conflict between privacy and freedom of information re: state's contribution to federal government's National Driver Register.

SB 5/26/77 Federal Privacy Act limits access to university records on students.

SB 12/11/75

AD 12/7/76 State Senator Wadsworth Yee criticizes government board for release of information on his business dealings.
AD  11/29/76  Media attorney (Richard Schmidt) claims that freedom of speech and the press override the right to privacy.

AD  10/11/76  Panel of newspaper executives and attorneys discuss the right to know vs. the right to privacy.

SB  9/28/76  Professor uses information gained through FOIA to sue the CIA.

SB  4/30/76  The state Attorney General initiates a study of Hawaii's information and privacy laws.

SB  3/ 2/76  Notification of customers (of credit card companies and financial institutions) whose account records have been subpoenaed by government agencies.

SB  2/25/76  Legislation: For the purpose of opening interdepartmental correspondence and revoking certain of the A.G.'s discretionary powers.

SB  11/14/75  Editorial: Raises concern over privacy in the computer age.

AD  9/29/75  Editorial: Expresses concern over the media's ability to weigh information and privacy interests.

AD  9/26/75  General discussion of the evolution of the right to privacy and the Federal Privacy Act.

AD  9/22/75  President Ford on the right to privacy.

SB  9/19/75  Collection and maintenance of investigative information by law enforcement agencies.
Editorials

Tuesday, November 3, 1987

A case for openness

 Acting Governor Ben Cayetano deserves credit for reversing an earlier state decision to withhold from the public detailed information about a government fisheries loan program where most repayments are delinquent.

But this again points up the need to reform the state law on public records to provide more openness in matters involving public officials and public funds. Too often such information is kept secret under the present wording of the law.

In this case the status of individual loans, who is behind and how much, was sought by The Advertiser. That was deemed personal and confidential information by an attorney general’s opinion, which itself was kept secret. Yet, the same kind of information has been made public in the past.

In any event, the larger point is that too many times in the past cautious or protective bureaucrats have been able to use the numerous exceptions in the public records law to keep legitimate information locked in the files.

To be sure, there has to be a balance between individual rights of privacy and the public’s right to know about government activities. But the present situation is out of balance in favor of too much secrecy.

Governor Waihee’s special Committee on Public Records and Privacy is preparing a report for the Legislature. It will cite dozens of issues in this area and make recommendations.

So the case for reform, with more emphasis on sunshine and less on secrecy, has long been clear, and the fisheries loan controversy adds to the evidence.
Cayetano to release delinquent loan file

By James Dooley
Staff Writer

State officials led by acting Gov. Ben Cayetano yesterday reversed an earlier decision to withhold from the public detailed information about a $5.2 million fisheries loan program in which loan repayments are more than 70 percent delinquent.

Cayetano, acting chief executive while Gov. John Waihee is in the Orient, said information sought by The Advertiser about the state Large and Small Fishing Vessel Loan Programs will be released tomorrow.

An official of the state Department of Business and Economic Development had said in an Oct. 29 letter that release of certain information sought by The Advertiser about the program would violate state law protecting the privacy of borrowers.

The official, Doreen Shishido of the DBED's Financial Assistance Branch, said she was acting according to a legal opinion supplied by the state Attorney General's Office. Shishido also declined to release the opinion, saying it was protected by the attorney-client privilege.

"The attorney general's opinion regarding the public releases of information will not be available to the general public," Shishido said in her Oct. 29 letter.

Cayetano and Attorney General Warren Price, responding to a story about the matter in yesterday's Advertiser, said DBED officials had decided to waive the attorney-client privilege and release the opinion.

And Cayetano, exercising his own discretion as acting governor, said he would release the loan information tomorrow because similar disclosures have been made through the Legislature in past public hearings about the loan programs.

"I am very confident that the governor will be in agreement with what I'm doing," Cayetano said. "This is material that has been provided before to the Legislature and the information has been available to the press in the past. Much as I respect the attorney general's opinion, I'm going to exercise my discretion and release the information."

The Advertiser asked Shishido in September for a list of all loan recipients and for a status report on the individual loans. Shishido initially declined both requests, saying her decision was based on an attorney general's opinion on the matter.

The Advertiser formally repeated its requests by letter Sept. 4 and also asked for a copy of the legal opinion.

In her written reply, Shishido released a list of loan recipients but said information about the status of the individual loans was confidential. And she said the legal opinion was protected by the attorney-client privilege and would not be released.

Price said Friday he did not know why the legal opinion was not released, but said DBED could rightfully decline to make it public.

Yesterday Price and Cayetano said the privilege was being waived and they released the opinion.

The opinion, written by Deputy Attorney General Ann M. Ogata, said: "Persons who are granted loans of state funds may not reasonably expect the same extent of privacy as persons who are granted loans from private financial institutions."

"The right of the public to know who is granted such discretionary loans of state funds outweighs the right of the individual to have his name kept confidential," Ogata said.

"The current status of an individual's loan, however, is a personal record relating to an individual's financial history and status," the opinion said. "It is therefore confidential and may not be publicly disclosed."

Cayetano yesterday echoed comments made by Price a day earlier that the Legislature needs to iron out conflicts between one state law protecting individual rights to privacy and a separate public-records law invoking the public's right to know about government activities.

A state panel appointed by Waihee is reviewing the problem and will make recommendations to the Legislature next year.
Delinquent loan data a secret; and state's reason also secret

By James Dooley

Citing privacy law, a state agency says it won't divulge detailed information about a $5.2 million fisheries loan program in which payments are delinquent on $4 million of the taxpayer money that has been loaned out.

The Department of Business and Economic Development says it's keeping the information secret because of a legal opinion from the state Attorney General's Office.

What does the opinion say? That's a secret, too.

"The attorney general's opinion regarding the public releases of information will not be made available to the general public," DBED official Doreen Shishido said in a letter received yesterday by The Advertiser.

State Attorney General Warren Price said yesterday he did not know why Shishido, chief of the financial assistance branch in DBED, elected not to release the legal opinion. But he said it was her department's right to invoke the attorney-client privilege and not release the document.

The Advertiser asked Shishido last month to supply information about the state's Large and Small Fishing Vessel Loan programs.

According to a 1986 government report on the loan programs, 79 percent of the Large Vessel loan portfolio—$3.5 million of $4.5 million outstanding—was delinquent as of Dec. 31, 1986. And 67 percent of the Small Vessel portfolio—$489,794 of $730,700—was delinquent, according to the report.

The Advertiser asked Shishido for a list of the loan recipients and for a status report on the individual loans.

Shishido initially refused to supply any information beyond what was contained in the report, saying an attorney general's opinion classified the information sought by The Advertiser.

See Delinquent, Page A-4
Delinquent loan data mired in secrecy

From Page One

The Advertiser formally requested the information in a Sept. 4 letter.

In her response received yesterday, Shishido did supply a list of all individuals and companies that have received loans. But she did not specify the size of the loans or whether payments are current.

"This information is considered personal record relating to an individual's financial history and status and, therefore, considered confidential," Shishido wrote.

Price said the information falls into a "gray area" of public documents. He said yesterday it is precisely this kind of conflict between the state's Privacy Act and the state's Sunshine Law, which mandates a policy of open meetings and records, that is now being addressed by a committee headed by Robert Alm, director of the state Department of Commerce and Consumer Affairs.

Price is a member of that panel as are several representatives of the news media.

"This is a close call, and I am in favor of a re-look at the laws so that we can get this sort of situation straightened out," Price said. "It's going to take some legislation next year."

"If we had released the information you requested, we might have exposed the state to a lawsuit from one of the borrowers," Price said.

As for the legal opinion supplied by Price's office to DBED on the matter, Price said, "The opinion itself is not a bell-ringer. Frankly, I don't know why they won't release it."

But he said the attorney-client privilege, which makes communications between lawyers and their clients confidential, can only be invoked by the client. "They're the client, and they've invoked it," Price said.

The Attorney General's Office issues different kinds of legal advice, some of it public record and some not, Price said. Informal, legal advice provided to the various department "clients" of the attorney general is protected by the attorney-client privilege, Price said.

Isn't the public the client of the state Attorney General's Office, too?

Price said the clients are defined by the state Constitution and law.

"We are prevented by law from giving legal advice to the public," Price said.

Advertiser Managing Editor Gerry Keir said yesterday that "the situation is so patently ridiculous it needs no comment from me to point it out. It would be comic if it weren't for the fact that this flim-flam reasoning is being used to hide from the taxpayers information on what's happening to their money."

Advertiser attorney Jeffrey Portnoy said the matter "is a perfect example of the mess that public records law now is in. Not only can't we get information which we believe is public, we can't get the reasons why we can't get the information."
Transsexual wants court data secret

By Ken Kobayashi
Adviser Courts Writer

A transsexual who is seeking Medicaid coverage for her surgery to correct complications from a sex-change operation has asked that her Circuit Court file be sealed to protect her rights of privacy.

Attorneys for Kimberly Shaw contend that records in the case contain information of a "highly personal and private nature" and its disclosure would cause Shaw "significant pain, embarrassment and humiliation."

The request is opposed by the state Attorney General's Office, which is arguing that the public, including taxpayers who pay for Medicaid, is entitled to know about the court case. "Whether or not Medicaid will cover controversial medical procedures is an issue of legitimate concern," state attorneys say.

Circuit Judge Simeon Acoba is scheduled to hear the request today.

The request was filed earlier this month by Legal Aid Society of Hawaii attorneys Kirk Cashmere and John Ishihara following news coverage of Shaw's Circuit Court appeal of the denial of Medicaid coverage by state Department of Human Services.

The appeal seeks to overturn a decision by a hearing officer presiding over administrative proceedings.

The Legal Aid attorneys are asking that if the judge doesn't go along with the request, he at least exclude from the case certain records from the administrative proceedings, including a 1976 letter by Shaw's former psychologist detailing "in considerable length her psychological and sexual history."

"It is an anomaly in the law that while state law and administrative rules place strict requirements on the (Department of Human Services) to keep all records and information about recipients confidential, a recipient is, in effect, forced to waive his or her right to confidentiality in order to seek relief from an adverse hearing decision," the attorneys said.

In an affidavit, Shaw said the news coverage has been "extremely distressing and upsetting for me." She said she has been "afraid to leave my residence and face friends, neighbors and the general public.

In his opposition, Deputy Attorney General Thomas Farrell said the "integrity and accountability of the judiciary has been based for more than 200 years on open court proceedings, even though witnesses or parties in a case may they will be embarrassed or humiliated.

Farrell said 76,000 Hawaii residents receive Medicaid which expends more than $175 million annually. He said some transsexuals on welfare will seek sex-reassignment surgery if the state's policy of denying coverage is reversed. He said others in the public may feel "very strongly" that this type of surgery shouldn't be covered.

He said some evidence may be personal or embarrassing, but said it is "doubtful" the public is interested in those details. He also said it hasn't been established that "responsible journalists cannot separate what is of public interest from that which is merely of prurient interest.

Two other requests have been filed this year in unrelated civil lawsuits seeking to close the cases to prevent embarrassment or damage to business reputations. Circuit Judge Robert Klein denied both requests.

Recently, a Honolulu businessman asked for a court order to keep his name out of a lawsuit alleging sexual misconduct, but he withdrew that request before the court hearing.
Dear Abby:

Solid citizen stung by false report

DEAR ABBY: I am a 37-year-old, single, honorably discharged Vietnam veteran who is well thought of in my community. I have excellent credit, a responsible job as an investment manager, and I work with disadvantaged children. I help raise money for charities and have a wonderful circle of friends. So what's the problem?

Recently, pursuant to the upgrading of corporate policy, a new background check was run on employees. No problem. Nothing for me to hide. Right? Wrong. It seems this large international investigation company returned a report on me saying that I had been arrested six years ago for drug possession, fined and imprisoned. There's just one minor problem. It wasn't me. By referencing the case number and calling the records divisions of the court, I was able to discover the individual they referred to in the background report:

1. Had a different middle name.
2. Obviously, a very different Social Security number.
3. Was a different race than I am.

This little fiasco caused indescribable tension with my employer and unbelievable embarrassment to me.

Abby, I am lucky. My employer at least showed me the report rather than immediately firing me as he might have. The point is not that I was able to get things straightened out and obtain a very halfhearted apology from this firm. The point, more significantly, is, how many innocent people are haunted by these grossly inaccurate, indeed, even libelous reports that they never get the chance to see? Jobs, mortgage loans, memberships to organizations — who knows what all a person will be denied because of one of these "small errors" in data retrieval?

Please let your readers know that anytime they suspect that one of these checks will be run on them, they have the right to request that a copy of the report be sent to their home. It would be a nice idea if some legislators would introduce a bill making dual reporting mandatory. What do you think? Incidentally, I am suing the reporting company. — MAD AS HELL IN SEATTLE

DEAR MAD: I think I would be even "madder" than you had I been victimized in that manner. Thank you for a valuable letter.
Businessman seeks anonymity in rape suit

By Ken Kobayashi
Advertiser Courts Writer

A Honolulu businessman described as a "well-known member of the community" is asking for a court order directing that he not be identified when his former stepdaughter accuses him of allegedly raping her in 1980 when she was 12 years old.

In the unusual request filed in Circuit Court this week, the businessman's attorneys said publicity about the "unsubstantiated" charges will subject their client to "scorn, embarrassment and harassment" and cause "irreparable harm" to his personal and business reputation.

The attorneys said the businessman "strongly denies" the allegations.

The businessman was identified in the request as "John Doe." The former stepdaughter was identified as "Jane Doe."

The request seeks a court order directing the former stepdaughter to file her lawsuit confidentially under seal or to identify the parties in the suit by the anonymous "John Doe" and "Jane Doe" designations.

Sherman Hee, one of the businessman's attorneys, said Cedric Choi, the lawyer for the former stepdaughter, has agreed to postpone filing the suit until the issue of identification is resolved.

Choi could not be reached for comment yesterday.

Circuit Judge Robert Klein is scheduled to hear the request Friday.

Hee said the former stepdaughter has been trying to obtain a settlement from his client, saying, "Either pay me money or I'll sue you and I'll say all these awful things about you."

Hee said he is trying to protect his client from "groundless" claims and "avoid the situation" where the courts are used as a club.

Once the suit is filed, Hee said he may also make other requests seeking to keep the identities of the parties confidential.

Jeffrey Portnoy, an attorney who represents The Honolulu Advertiser and other news organizations on a number of issues related to the media, said the request is "very unique."

If the request is granted, he said, it may pave the way for persons who know they are going to be sued to seek court orders saying they also should be sued anonymously. He said it could lead to the courts "institutionally guaranteeing secrecy of litigation."

He said allegations of sexual assault are damaging, but so are other accusations that are contained in lawsuits, such as allegations that a drunken driver killed a minor or that a corporation knew that its gas tank was going to explode.

He said if the nature of the allegation is the basis for keeping parties anonymous, "very few suits would be public."

Portnoy also said the question remains whether the media will report about the lawsuit and identify the parties, but it "shouldn't be up to the courts to make that decision" by allowing the individuals to remain anonymous.

Hee's request said the businessman has been informed that his former stepdaughter, 20, will allege that he "assaulted and battered, sexually abused and raped her."

In addition to describing him as "well-known," the request said the businessman is a "model citizen" and his wife and family will also suffer considerable embarrassment from the lawsuit.

The Honolulu Advertiser

C ** Wednesday, September 30, 1987 A-3
HLRB: No employee list for union

The Hawaii Teamsters Union will have a tougher time campaigning for the right to represent state prison guards and other institutional workers following a decision issued yesterday by the state Labor Relations Board.

The board ruled that the state privacy law prohibits the state and city from disclosing a list of the names and addresses of 2,000 bargaining unit members to the Teamsters.

The Teamsters are hoping to displace the United Public Workers as the workers' sole bargaining agent. A representation election has been scheduled for Oct. 13-16.

Both unions will be allowed to campaign at work sites, but the board's decision prevents the Teamsters from gaining access to the employers' list of employee names and addresses.

"They're crazy," Teamsters Art Rutledge said on learning of the decision. Rutledge then said he would have to read the ruling first before commenting at length. The union could appeal the decision.

UPW attorney Herbert Takahashi had objected to release of the names and addresses, arguing that the board could open itself to violation-of-privacy suits if the information was disclosed.

The election will cover nonprofessional hospital and institutional employees at such facilities as the Halawa Medium Security Facility, Hawaii State Hospital and Waimano Training School and Hospital.
The need for open government

You and I are paying the government to make decisions that affect our lives in many ways, including our pocketbooks and wallets. Too often, government employees—elected, appointed, and civil service—are rude, arrogant and secretive.

Open government is mandatory for our survival as a democracy. Secrecy breeds contempt for the law and deprives citizens of their rights, bit by bit.

Everything about the financial dealings of those who dispense our money should be available for the public to scrutinize and evaluate.

All government meeting records must be included. It is my money, my taxes. We must demand easy disclosure—and ready access to all except the most intimate records. We must demand no less than full, complete and easy access.

The right to privacy, of course, should protect the names of rape victims, child abuse victims and the like. But that is about it.

The right to privacy has been used to shield some questionable practices and it is this attitude of hiding information that I oppose.

Hawaii has one of the most restrictive privacy laws in the nation. We want all public records to be available to the public. Let us open up and let the fresh air in.

Maria Hustace
Driver hid his past, Salvation Army says

WAILUKU — A former Texas man with a lengthy criminal history of sexual assaults of children hid his past from Salvation Army officials on Maui, an attorney for the Salvation Army told The Advertiser yesterday.

Paul K. Grubb, 51, was sentenced last week to 55 years in prison on five counts of rape, sex abuse and sodomy in 2nd Circuit Court here.

At the time of the incidents, Grubb was a volunteer driver for the Salvation Army in Lahaina. Grubb's prior record was cited by 2nd Circuit Judge E. John McConnell, who said there was no hope for rehabilitation for Grubb.

Grubb previously was convicted for sexual assault of young girls in Kentucky and Texas, and served a nine-year prison term in Texas. He also is subject to extradition to Texas for an additional charge of aggravated sexual assault involving a child.

Attorney Paul Ganley, who represents the Salvation Army, said Grubb was able to hide his record because of state privacy laws which do not allow agencies such as the Salvation Army to ask police for checks on a person's criminal history.

"It's a kind of a Catch 22 situation because the agency can't request any employee or volunteer to supply such information," Ganley said.

In Grubb's case, Salvation Army officials initially had him working at menial tasks around the West Maui facility before giving him the job of driving a Sunday school bus, Ganley said.

The parents of the three children assaulted by Grubb have filed a suit against the Salvation Army claiming the agency should have investigated Grubb's background before allowing him to be responsible for driving children around.

Ganley said that privacy laws prohibit police from releasing such information on any individual. In sentencing Grubb, Judge McConnell said he recognized the psychological damage suffered by the children in the series of assaults. Thus, he ordered consecutive terms on each of the counts, totaling 55 years.

He said the lengthy prison term is intended to make clear that Grubb should be held in prison "until he is no longer a danger to the community."
Secrecy in government

I was surprised that the Star-Bulletin did not report on the hearings of the Governor’s Committee on Public Records and Privacy last week.

John Simonds, senior editor of the Star-Bulletin, thought it was important enough to testify in person, and Stirling Morka, a writer at the Star-Bulletin, has taken time out of his busy schedule to serve as a committee member.

But for some reason your news staff didn’t consider it worthy of coverage.

There are few subjects more important to our form of democratic government than the problems resulting from the contradictions between the sunshine law and the privacy law. For many years the state administration has used the privacy law as a means of keeping information from the public and the media. Even the salaries of government officials and employees have been withheld.

The hearings were well attended and testimony describing many problems in getting public information was given by representatives from business groups, labor unions, human service agencies, Common Cause, the League of Women Voters, the Media Council, former state Attorney General Michael Lilly and many others.

Beverly Keever, a journalism educator, revealed that state agencies have never adopted administrative rules to implement the privacy statute even though the law requiring such rules was passed seven years ago. Instead, the attorney general’s office has issued secret memoranda instructing departments to withhold public information.

Hawaii’s state government is one of the most secretive in the nation. Constant vigilance by the media is required to offset the unfortunate tendency of some state officials to cover up their transgressions or to deny access to information which would empower the individual citizen against government insiders.

I commend the Star-Bulletin for the strong stand you have taken in your editorial pages advocating openness in government. I hope your news staff will pay close attention to this important issue and to the work of the governor’s committee.

Rep. Rod Tam
Balancing privacy and public interest

Editor's note: This testimony was delivered at last week's state Capitol hearing of the Governor's Committee on Public Records and Privacy.

By Gerry Keir
Advertiser Managing Editor

Hawaii's law on public meetings and records begins with the ringing declaration that "In a democracy, the people are vested with the ultimate decision-making power..."

The Legislature declares that it is the policy of this state that the formation and conduct of public policy — the discussions, deliberations, and actions of governmental agencies — shall be conducted as openly as possible.

That all sounds just fine.

BUT THE SAME law goes on to outline a pile of exceptions, including the giant category of exemptions for "privacy."

The public records section of the law makes a great-sounding statement about what a public record is, but then excludes all "records which invade the privacy of an individual" and contains an overdraft definition of personal records.

Not only is an individual's own educational, financial, medical and employment record secret, but so is "any other item that contains or makes reference to the individual's name, identifying number, symbol or other identifying particular."

This restricts access to public records which in any way contain personal information about any individual regardless of whether that individual is a public official, regardless of whether tax dollars are being used to pay the salaries of that individual, with no attempt to balance the public's right to know versus an individual's right to privacy.

Clearly, the proper day-to-day functioning of any law depends on a great deal on the bureaucrats who administer it. And the privacy law was written so as to encourage public employees to deny access for fear of being fired. Counter clerks and other front-line bureaucrats tend to err on the side of not releasing information.

Given that inherent caution and the overall thrust of the privacy law, the message to custodians of public records is clear: when in doubt, opt for secrecy.

AS A RESULT, when the legislature considers the public's right to know, they must balance the public's interest in access to the record with the individual's right to privacy. The public has the burden of proof to show that the record is properly withheld.

There is an appeals procedure through the courts. But the language of the privacy law is so broad that many appeals are doomed to failure. Even where there is a good chance of victory, the cost constitutes a chilling effect on any individual or news medium seeking to challenge a decision made under this chapter.

In my view, changes are needed to make more information available about public employees and the public record information to be segregated. That would mean that instead of all information of any kind in a record being restricted from public view just because somebody's name is in it, only that limited information deservedly private would be excised. The balance would be open to the public.

There should be a balancing test to determine whether public interest in disclosure outweighs the privacy interest of the individual involved.

Such changes would bring the state law into closer conformity with the federal Freedom of Information Act. That act is far from perfect, but... and at least the federal act attempts to strike a balance, to release to the public as much information as possible while excising only that limited information deservedly private.

Some of the things that have come to light through use of the FOI Act are information on FBI harassment of civil rights leaders, auto design defects, consumer product testing, the salaries of public employees, compliance with antidiscrimination laws, sanitary conditions in food processing plants — the list goes on and on.

I think we could do worse than to use the federal law as a starting point in recasting our own law.
Panel hears testimony on openness issue

By Donna Reyes
Adviser Government Bureau

A number of people urged the governor's ad hoc committee yesterday to "let the fresh air and sunshine in" on off-closed public records.

About 20 people testified at a hearing of the Governor's Committee on Public Records and Privacy at the State Capitol auditorium. The nine-member committee is listening to citizen opinions on what does and doesn't belong on the public record.

The committee will submit its report to the Gov. John Waihee in October.

Molokai cattle rancher Maria Hustace said easy disclosure and ready access should be available for all but the "most intimate" records.

"The right to privacy should, of course, obviously protect the names of rape victims, child-abuse victims and the like. But that is about it," Hustace said.

"The right to privacy has been used to shield some questionable practices and it is this attitude of hiding information that we oppose."

Hustace, an unsuccessful congressional candidate in last year's election, said: "Hawaii has one of the most restrictive privacy laws in the nation. Let's open up and let the fresh air in."

Michael Lilly, former state attorney general, said Hawaii doesn't need any new laws because the existing privacy laws are not that restrictive.

"The problem comes only in the interpretation of the privacy act," Lilly said. "The law is there to allow public records to be made open.

"But the balance always falls in closing government in Hawaii when it could go either way. They don't want to release public documents, and they're afraid to release public documents."

Gerry Keir, managing editor of The Honolulu Advertiser, said changes need to be made to make more information about public employees public, and to allow public record information to be segregated from the limited information that deserves to be kept private.

Keir suggested there "be a balancing test to determine whether public interest in disclosure outweighs the privacy interest of the individual involved."

Walter Oda of the Fair Trades Practices Committee of the Painting Industry of Hawaii said the public ought to be able to monitor corruption in public works contracting and other areas.

The public has a right to know when a contractor performing a public-works project is found in violation of the law, but such information is now regarded as "privileged information under the veil of the privacy act," Oda said.

Jim Denzer of Hawaii Child Centers urged caution.

"We don't mind a public record on an accusation (of child abuse) that has some merit," he said. "But to make public records of false accusations is destructive of the innocent, serves no useful purpose and will not deter child molesters."

The hearings are over, but interested persons may send written comments to The Governor's Committee on Public Records and Privacy, P.O. Box 541, Honolulu, HI 96809. For more information, call 548-7865.
Hawaii’s public records and rights of privacy

Governor Waihee’s Committee on Public Records and Privacy has begun a series of hearings on what state records people think ought to be open to the public and which ones closed for reasons of privacy.

This is naturally a subject of great interest to news organizations, but it also should command the attention of everyone who cares about keeping the process of government open to the full view of the taxpayers.

It’s our belief that the public should have open and reasonably convenient access to birth, death and marriage certificates, accident reports, property ownership and tax records, building permits, motor vehicle registration, driver’s license records, professional and vocational licensing data, findings of environmental agencies, information on state loans and leases, liquor licenses, divorce decrees, wills in probate, salaries of federal, state and local officials.

Some of these are already open and easily available. Some are under the jurisdiction of the counties or the courts. Some are open but available only to lawyers, doctors or insurance agents. Some are public but hard to find. In some cases public inquiry is discouraged.

With the possible exception of personal health records, income taxes and reports of misdemeanors involving minors we’d like to see everything open — records, meetings, decisions — in all branches and at all levels of government.

Hawaii’s privacy law, mandated by the 1976 State Constitutional Convention, is considered one of the most restrictive in the nation. It has put obstacles in the path of information, given some officials a general excuse for not releasing data that should be routinely available, and contributed further to a spirit of secretiveness among government agencies.

The governor is to be commended for appointing a committee, under Robert Aim, director of Commerce and Consumer Affairs, to look into this area. It has been gathering opinion on the Neighbor Islands this week and has scheduled hearings for next Thursday in the State Capitol auditorium.

This is a chance for those who feel, as we do, that state government needs to open up more, to say so; and also for those who may disagree to argue for more privacy. In any case, it’s a rare opportunity to make your views known on the public record.
HonFed abandons court bid to seal suit documents

TUE APR 14 1987

Honolulu Federal Savings and Loan Association yesterday withdrew its request that a court seal all documents in a lawsuit filed against it, but asked a federal judge to block public access to some business records in the suit.

Federal District Judge Harold Fong delayed ruling on that request until he decides whether to send the lawsuit back to state court where it began.

The suit was filed in January by David Lacy, a former HonFed executive who alleged that the institution hired him in 1985 without disclosing the true nature of its financial condition. Lacy also alleged that he was "constructively discharged" by HonFed and that his career prospects were damaged as a result.

Lacy filed the suit in state court, but HonFed asked that it be moved to federal court, arguing that since savings and loan is federally regulated, the suit belonged in federal court.

Fong said he would issue a written ruling on the matter later.

HonFed attorney Jared Jessen and William Swope, attorney for HonFed President Kenneth Fujinaka, said yesterday that they had withdrawn a motion to seal virtually all the records in the case. Instead, they will ask the court only to bar public access to certain "confidential" business records necessary for the day-to-day operation of the business, they said.
By Jerry Burris  
Adviser/Politics Editor

A six-month effort aimed at sorting out the conflict between the public's right-to-know about government and an individual's right to privacy was launched yesterday at the state Capitol.

A committee appointed by Gov. John Waihee began what is expected to be a major review of Hawaii's public records and privacy laws.

There have been numerous controversies and legal disputes over what is public information and what should be kept private.

In fact, the Legislature this session has dealt with several issues including whether the professional and personal background of an appointed govern-

ment official should be public information.

In the past, there have been disputes over everything from the salaries of government appointees to the deliberations of advisory commissions.

Acting Committee Chairman Robert Alm, director of the Department of Commerce and Consumer Affairs, said the Waihee administration is committed to openness. But he said the administration also recognizes the state Constitution gives every citizen a "right to privacy."

"From the administration's point of view," Alm said, "we don't want to be perceived as hiding things or doing things behind closed doors because we have something to be ashamed of, because we don't."

The nine-member committee will prepare a report that analyzes the current open records and privacy laws. It will begin with a review of materials and case histories and then launch a series of public hearings, probably in May. After further review and discussion, the group intends to present its report by October.

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Sunshine Law Panel to Hold First Meeting

Honolulu Star-Bulletin
Wednesday, March 4, 1987

The City Council's newly formed Sunshine Law advisory committee will hold its initial meeting tomorrow.

Councillor Marilyn Bornhorst said the 10-member citizens' panel will review the state's open-meeting statutes and their relation to both the City Charter and the Council's own rules and procedures.

The group will meet at 4 p.m. in the second-floor committee room at Honolulu Hale.
Donald Tsukiyama and the public’s right to know

By Ken Kobayashi

Circuit Judge Donald Tsukiyama is listening to attorneys argue why he shouldn’t issue a “gag order” prohibiting them from talking to the press. One suggests that talking to the media might clarify court proceedings so reporters won’t end up with “an inaccurate picture.”

“Why don’t you present an accurate picture?” Tsukiyama replies.

An exchange occurred more than two years ago, but Tsukiyama’s remark reflects a view that has led to an almost ongoing dispute with the media over what aspects of court proceedings should be kept private and what should be made public.

In recent weeks, the dispute seems to have heated up.

During sentencing for Judy Ann Shibuya, who was accused of shooting an uncle who said he had sexually abused her, Tsukiyama called a recess and conducted the rest of the hearing in the privacy of his chambers. In the theft and forgery case of former Democratic official Douglas Eaglestone, Tsukiyama sealed documents that said he might hurt the reputations of witnesses.

“Judge Tsukiyama has made some fairly strong statements which indicate he’s not a big fan of the media,” says Jeffrey Portnoy, a deputy attorney general whose clients include The Honolulu Advertiser, KHON-TV and

From Page A-3

News Analysis

at various times, other television and radio stations
Portnoy says he’s been called to repre
tent the media before Tsukiyama far more than before any other judge. Unlike
some other judges, Tsukiyama almost always rules against the media. Portnoy says
“I sometimes think he views the media not as an enemy of his. Tsukiyama declined to be interviewed, but his remarks in the past generally indicate a distrust of the media.

Consider:
- As public defender in 1978, Tsukiyama told the Hawaii Supreme Court that the closure of a preliminary hearing in a murder-robbery case did not involve a conflict between the rights of a defendant to a fair trial and the rights of a free press. The reason the great wanted the hearings open, he said, was to obtain “fresh news” because “state news does not sell newspapers.

In 1984, during the discussion about the “gag order,” Tsukiyama went on to say that the lawyer may have a point. "If a person is going to be indicted, prosecuted and convicted by the media, then perhaps that is the only avenue for explaining one’s conduct," he said.

The case involved voter fraud charges against then-state Sen. Clifford Uwane and his niece Rosa Segawa. Tsukiyama issued his “gag order.” Two days later, the Hawaii Supreme Court overturned his ruling.

Last month, Tsukiyama said he couldn’t assume the media would be “responsible” and specifically criticized the Advertiser’s coverage of the Eaglestone case. He took exception to the article and headline about his decision barring reference during the trial about allegations of gambling debts.

“When we talk about responsible reporting, that article alone would suggest to me I cannot make such an assumption in doing my job of protecting the integrity and fairness of this proceeding,” he said.

Why does Tsukiyama view the media this way?

Some suggest it deals with his previous job as public defender, a post he held for eight years.

Tsukiyama, 51, son of the late Chief Justice Wilfred Tsukiyama, was named to the statewide post in 1972, replacing Brook Hart. He remained in that position until 1980, when he was appointed to the circuit court term is for 10 years.

As the public defender advocating the rights of the defendants, some believe Tsukiyama might have come to view those rights as superseding those of the

See Donald on Page A-10

Circuit Judge Donald Tsukiyama: "protecting the integrity and fairness of the proceeding."

That afternoon, without re
turning to the courtroom, Tsukiyama filed a written decision

that added a new twist to the issue of open or closed court proceedings. Shibuya was convicted of aided and abetted in

shooting her uncle, but testified that he had sexually abused her for years. The sentencing

drew a packed courtroom.

After listening to arguments from the attorneys, Tsukiyama, in his own words, ruled that the proceedings had been heard and that he didn’t want the proceedings to turn into a “spectacle,” but Hart said he didn’t know what that

"What was on in chambers was nothing that’s in my

judgment had to be in chambers in order to go to the courtroom,”

Hart said.

Shibuya gave a statement, but

even encouraged her to do by probating, shocking Hart, Shibuya’s attorney.

Hart at the time said that the public might feel otherwise.

"The public’s right to know was frustrated from that point of view. If it was courts means for the public, I’d have a lot of things to say, but from Judge’s point of view, there was no rea

"I think it was outrageous," says Media Lind, one of the speculators who waited in the gallery until the bailiff notified them that the court wouldn’t reconvene.

Shibuya said she didn’t know what that

asked later by reporters why

he felt he had to go into cham

bers, Tsukiyama, characteristi
cally, declined to comment.

asked later by reporters why
Reporter: ‘Paranoia’ got Reagan in trouble

By Bonn Bonck

Investigative reporter Angus Mackenzie said yesterday that it was secrecy, and not the press, that got President Reagan and his administration into trouble for selling arms to Iran.

"The Tower Commission concludes that this administration has an obsession with secrecy and that obsession is at the root of the current problem in Washington, D.C. This administration is so paranoid about leaks to the press that they've kept their policies out of the normal decision-making channels so that even people within the administration, who might have objected, didn't know what was going on," Mackenzie said.

The Reagan administration, he said, did not want the word to get out because they knew they were going to be doing things that the American people did not want.

Mackenzie, director of the Freedom of Information Project with the Center for Investigative Reporting in San Francisco, spoke yesterday in the University of Hawaii's Hemenway Theatre on the Reagan administration's restrictions on freedom of information. He was joined on the program by Hawaii media attorney Jeff Portnoy and Common Cause director lan Lind.

Portnoy, who spoke about local access to government information, said that the administration of former Gov. George Ariyoshi was more closed than many people realize.

"There was a philosophy of closed government unless forced open. The media and others went to court three times in the last decade to try to force open meetings and force access to records.

"We were successful once or twice and unsuccessful more than that. Even the minority members of the Legislature had to sue in court to get access to budget information that was withheld from them by the majority members of the Legislature."

Portnoy added that Hawaii's open record and meeting laws, which "as written are some of the most liberal in the country," still leave too much discretion to administrators. "It will be interesting to see whether the new administration will be more open than the last one," he said.

Lind said that while government agencies are subject to Hawaii's openness laws, it has been common in the past to close off channels of information to avoid disclosure of embarrassing information. News reporters, he said, should be free to talk to anybody in government and not be forced to get their story from public relations people who don't really know what's going on.

"Under the guise of protecting personal privacy, the state withholds things like salaries of public officials, their job descriptions and even their resumes," Lind said.

"We have a right to know if people on the public payroll are qualified for the jobs they are doing."

Lind said that the administration of Gov. John Waihee has shown a willingness to head in the direction of more open government in Hawaii but it's too early to say how long that spirit will last.
Open government

Recently, the state demonstrated a callous disregard of the right of every member of the public to review documents maintained by the state.

Hawaii has very liberal “open government” laws. Those laws were meant to open the business of government to the public. Additionally, public scrutiny of government operations serves important goals.

For example, public access to government documents allows each citizen the opportunity to decide for himself whether actions taken by his government are proper. It also reduces public distrust in government decision-making. And it helps improve public integrity in government operations.

Conversely, maintaining a veil of secrecy over the activities of the state creates doubt and distrust and trivializes the Legislature’s mandate “that the formation and conduct of public policy — the discussions, deliberations, decisions, and actions of governmental agencies — shall be conducted as openly as possible.”

Unfortunately, the state has too often emasculated the right of public access. Recently, for example, my client complained to the Department of Commerce and Consumer Affairs that a public works contractor had violated numerous contractor license laws. Apparently, the department agreed because it entered into a secret “settlement agreement” with the public contractor. When we asked for a copy of the agreement, the state refused. It claimed that the agreement was “private” because it included the name of an officer of the public contractor’s corporation.

The “settlement agreement” was also signed without the apparent knowledge or approval of the Contractors License Board, which — unlike the department — is required to do all of its business in public. And the Contractors License Board is the lawful body empowered to review and punish violations of the contractor license laws.

Under the department’s position, any time it wants to shield a public document from public view, all it has to do is include the name of any individual in the document. Then, it can keep the activities of state government secret from the public and other government agencies. This was not the intent of Hawaii’s open government laws.

Auwe, Department of Commerce and Consumer Affairs.

MICHAEL A. LILLY
Panel OKs releasing officials’ qualifications

By William Kresnak

The House Judiciary Committee, in a move to promote open government, yesterday approved an amended measure to allow the release of records related to the qualifications of appointed officials.

The original bill took a broader approach to balance the public’s right to know and the privacy rights of individuals. But Judiciary Chairman Wayne Metcalf, who is “very concerned” about the entire issue, said he wanted to limit the bill to cover “a specific situation that occurred across the street.”

Metcalf was referring to the city administration’s initial refusal to release the resume of Hiram Kamaka when he was named parks and recreation director.

Common Cause, a public interest group, wanted to know Kamaka’s qualifications to see if he met City Charter provisions for the position.

Metcalf said his committee would work between legislative sessions, in conjunction with a governor’s panel that is studying the state’s public records laws.

Under the broader proposal, government agencies could have released public records after eliminating personal information. The measure also would have allowed officials to decide whether the public interest in the disclosure of documents outweighed the privacy rights of anyone named in the records.

Attorney Jeffrey Portnoy, representing The Advertiser, testified the law needs to be changed because officials have refused to release records that contain any personal information, even if the person involved is a public official or employee.

This has blocked attempts to find out such things as the salaries of University of Hawaii employees or how many crimes were committed on the Manoa campus, he said.

“I am afraid that (without the bill) the current practice of virtually restricting all access to important and relevant public information will be maintained and the citizens of Hawaii and our democratic system of government will suffer,” Portnoy said.
Editorials

For open records

Revision of Hawaii's often-ambiguous public records laws is long overdue. So it's a step in the right direction that Governor John Waihee has appointed a committee to review current laws and to recommend changes.

The committee has the potential to perform a valuable service for everyone. Too often, the public is denied access to some state documents and records because of vague and conflicting regulations or uninformed officials.

Such secrecy inevitably raises questions about whether government is operating efficiently, legally and in the public interest.

The governor's committee has its roots in the state's failure to delineate between two rights — the public right to know and the right of privacy.

Waihee himself has hidden behind the privacy law to deny taxpayers access to specific information about key aides' salaries. And last year, the Attorney General's Office ruled that salaries of key University of Hawaii officials were secret.

One problem is that the attorney general, appointed by the governor, has too much discretion to make determinations on key openness issues — from resumes of public officials to government contracts and state spending.

Clearly, some government information, such as workers' health records, should be kept confidential. Too often, however, officials veer toward privacy at the expense of openness. This was almost a trademark of the last administration.

If there's a drawback to the governor's new committee, it's that the nine-man group was too hastily chosen. Unfortunately, it contains neither women nor representatives of major Hawaii journalists' groups.

Despite these omissions, the committee has a rare opportunity to offer needed direction to legislators. The hope is that next year it will make substantive amendments to the public records' laws in favor of more openness in state and county government.

Privacy and the media to be topic at SPJ meet

Robert Alm, chairman of the Governor's Commission on Privacy, will speak about the commission's goals and their potential impact on the media at a May 11 meeting of the Hawaii chapter of the Society of Professional Journalists, Sigma Delta Chi.

The meeting, which is open to the public, starts at noon in the Siesta Room of the Flamingo Chuckwagon.

Alm, director of the state Department of Commerce and Consumer Affairs, was appointed earlier this year by Gov. John Waihee to head the nine-member commission, which is analyzing Hawaii's privacy laws.

For reservations, call Anne Harpham at 525-8062 by Friday.
Kauai opposes raise for lawmakers

LIHUE — The state Legislative Salary Commission heard unanimous opposition last night to a proposal to raise state legislators' salaries from $15,600 to $25,000 a year.

Two speakers based their opinions directly on the job the Legislature has been doing.

"I don't think they deserve them, because this place is a wreck," said Deborah Spence, a homeless mother of two who said she has been unable to find housing. The Legislature should have mandated that resorts build employee housing, she added.

John Palmeira, who is retired but said he had to go back to work to survive, said: "I don't know how the hell they get the money to pay their pay raises, but they can't find it to fix our roads."

Arthur Trask said Hawaii, a small state, ranks 18th among the states in legislative pay. He suggested salaries be reduced.

Gregory Goodwin said salaries should be raised only if legislators do so good a job that they eliminate the Legislature, replacing the present system with a more representative form of democracy.

But on Maui, Herman Adalst — the only person who testified Tuesday — said legislators should get more than the proposed $25,000 and suggested a salary of $26,000 to $27,000.

Panel to review public records laws

Gov. John Waihe'e yesterday named a nine-member committee to review state public records laws.

The governor wants a "big picture" look at the laws, said Carolyn Tanaka, his press secretary. He wants open government but also wants a balance between the public's right to know and individuals' rights to privacy, she said.

Named to the committee were: Robert Alm, director of commerce and consumer affairs, who will serve as chairman; Attorney General Warren Price; Ian Lind, executive director of Common Cause; Stirling Morita, a reporter with the Honolulu Star-Bulletin; Jim McCoy, assignment editor at KHON-TV; and Hawaii Supreme Court Justice Frank Padgett.

Also, Andrew Chang, manager of government relations for Hawaiian Electric Co.; Duane Brememan, vice president and general manager of Nissan Hawaii; and David Dezzanni, a partner at the law firm of Goodsill, Anderson, Quinn and Stiefel.
Woman Informant Identified in Smear Report Sues

State, KGMB-TV Targets of $10 Million Suit

By Lee Cotterall
Star-Bulletin Writer

A woman identified in documents released by the attorney general's office as the confidential informant to authorities in the Cec Heftel "smear" document has filed a $10 million lawsuit against the state and KGMB-TV.

Gov. George Ariyoshi, Attorney General Corinne Watanabe and Deputy Attorney General Keith Kaneshiro are named as defendants in the suit, which does not identify the plaintif—the woman and her husband.

Attorney Paul Tomar filed the suit in Circuit Court yesterday, saying the state's disclosure of his client's identity was an invaion of privacy "of almost unprecedented proportions."

State drug enforcement agent John Madinger in August 1983 made an investigative report in which he wrote that the woman said then-congressman Heftel was involved in drugs and sexual activities with "young males and females."

The report was distributed in the final days of Heftel's primary campaign for governor this year and the attorney general's office launched an investigation to try to find out how it had been leaked to the public.

HEFTEL LOST the Democratic primary to Lt. Gov. John Waihee, now the governor-elect.

On Oct. 29, Ariyoshi, Watanabe and Kaneshiro revealed to the public seven volumes of documents produced in the attorney general's investigation.

KGMB anchor Bob Jones reported the next day that the woman had been named in those documents as the confidential informant. Other news media declined to report her identity.

The woman's name was deleted from the documents soon afterward, but Tomar said information remaining in the documents made it "quite easy" for someone to determine his client's identity "with just a minimal digging."

Ariyoshi this week cut off public access to the entire seven volumes of documents.

Tomar said his client made the statement to Madinger to cooperate with state authorities in connection with her state criminal case. She served a four-year prison term in a federal drug case and was granted probation in state court after her cooperation.

TOMAR SAID the release of her name in the attorney general's report was "a shocking and almost inconceivable blunder. This is a case where the political system and the quest for public office has run amok."

At a news conference, Tomar said, the report apparently was released because of anticipated accusations of a "cover-up."

The woman and her husband have received a bomb threat at their place of business and "numerous phone calls at their unlisted number throughout the night" since the report was made public, Tomar said. The report included their telephone number.

Tomar said his client feels "she really never can conduct a normal life here or run a normal business in Hawaii without people possibly associating her with this very sorry episode in Hawaii politics."

He said the woman left Honolulu after her identity as the confidential informant was made public, returned and has since left the city again.

INFORMANT'S ATTORNEY—Paul Tomar, attorney for a confidential informant who told state investigators second-hand information about Cecil Heftel, tells news reporters yesterday the woman is suing the state for identifying her.
Withdrawal of ‘Smear’ Report Criticized

By Robbie Dingeman
Star-Bulletin Writer

Common Cause/Hawaii is protesting Gov. George Ariyoshi’s actions regarding public access to the state report on the investigation of a “smear” document about Cecil Heffel.

The citizens’ group criticized Ariyoshi’s move to first open and then stop access to the document as appearing “to have been taken without regard for the laws governing access to public records.”

Common Cause Executive Director Ian Lind yesterday sent a letter to state Attorney General Corinne Watanabe saying that “decisions concerning access to public records should be responsive to the public’s right to know and should not be based on the personal whim of the governor or of any other public official.”

The report, which was made public Oct. 29, contained investigator’s reports and extensive statements of those interviewed about the release of a confidential document the week before Heffel was defeated in the Democratic gubernatorial primary.

LIND CHARGED that the governor’s original decision to release the entire report ignored possible violations of the personal privacy of individuals named in the report.

“Ironically, this occurred despite the fact that the same privacy provisions have been interpreted extremely broadly and previously used by the administration to close off public access to various types of information, in our view, were proper matters of public record,” Lind wrote.

The decision to stop access, he said, “Does not appear to have been informed by an appreciation of Hawaii Sunshine Law.”

Lind said the report appears to be a public record which the public should have a right to inspect or get copies of after portions that constitute an invasion of privacy are removed.

Ariyoshi spokesman Bob Wernet said the governor felt enough time had been given for public review of the report. Ariyoshi is visiting Asia and could not be reached for further comment.

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Marsland: Aide was wrong to give report but his aim was honorable

By Jay Hartwell
Advertiser Staff Writer

City Prosecutor Charles Marsland yesterday would not accept the resignation of his aide Rob Luck, who admitted giving a copy of a confidential report about Cec Heftel to the former congressman's son.

Luck said Wednesday he gave the report, which contained allegations about Cec Heftel, to Chris Heftel about six weeks before the primary. Luck said he knew others had copies of the report and was concerned they would use it against Cec Heftel and his campaign for governor.

Yesterday, Marsland said, "His action was improper and he should not have done it. However, his intentions and motivations were honorable. If Rob has a fault, it is in the fact that he is a decent and caring human being — and he was once again trying to help someone who was being deliberately hurt."

Luck said he was "very grateful" for Marsland's support, but he still may resign his job. "The experience has been very stressful for me and my family. I need to weigh my options personally and professionally. I am concerned whether I can be effective in my position and whether I've irreparably damaged the credibility of this office."

State Attorney General Corinne Watanabe yesterday said Luck appears to have violated the state privacy code when he gave Heftel's son a copy of the confidential report, which names 31 people, but Marsland disagreed.

He said the law allows a personal record to be turned over "to a duly authorized agent of the individual to whom it pertains."

"Yes, but there are a lot of the other people in that report," Watanabe said, and their names should have been made illegible.

She added that only Marsland could take disciplinary action against Luck, and the prosecutor said he would not. "Rob made an error in judgment, but he did not act with any malicious or criminal intent."

Marsland said he was surprised last week when Luck told him he gave Chris Heftel a copy of the report. "I told him it was wrong," Marsland said.

The report is a written summary of what an unidentified "cooperating individual" allegedly told state narcotics investigators in August 1983. It contains allegations which Cec Heftel says are false.

Marsland said a copy of the report was received three years ago from the state's Narcotics Control Section and a copy of that copy was kept in a filing cabinet in a vacant office next to his.

Common Cause questions smear probe move

The state appears to have ignored both "sunshine" and "privacy" laws in its handling of the attorney general's investigation into the smear effort against gubernatorial candidate Cec Heftel, the citizen lobbying group Common Cause said yesterday.

The group released a copy of a letter from executive director Ian Lind to Attorney General Corinne Watanabe. The letter asked what the state plans to do with the seven-volume report of her investigation into release of a confidential drug report than mentions Heftel's name.

Lind noted the full report of the investigation was made public for a time, and then was closed on the orders of Gov. George Ariyoshi.

"Common Cause is concerned because both of these actions appear to have been taken without regard for the laws governing access to public records," Lind wrote.

The original release may have violated privacy laws while the subsequent closing of the report may have violated "sunshine" public record statutes, he said.

"Does your office plan to resume public access to the report?" he asked. "If not, could you please indicate the basis on which public inspection is being denied?"
City, State Differ on Element of Fault in Release of Heftel Report

By Stirling Morita
Star-Bulletin Writer

City and state attorneys still disagree about whether a city prosecutor's aide violated Hawaii's privacy law by giving Cec Heftel's son a copy of the so-called smear report.

Republican Prosecutor Charles Marsland yesterday said that he will not discipline his aide, Rob Luck, nor accept his resignation.

This is because the privacy law allows government employees to release private records to "authorized agents" of the person named in the records, Marsland said.

Chris Heftel qualifies as an authorized agent, he said.

Luck said he gave a copy of the report to Chris Heftel about Aug. 12 because he felt Cec Heftel should know about the unsubstantiated allegations.

BUT KEITH Kaneshiro, a deputy state attorney general in charge of investigating the anonymous distribution of the smear report, said Luck's actions still violated the privacy code.

The 30 other people named in the report could have had their privacy invaded, but might be hard pressed to complain about it because Marsland already has said there is no problem, Kaneshiro said.

The privacy question could be avoided only if the names of the other people had been blacked out, he noted.

"I have problems with his (Marsland's) rationale," Kaneshiro said.

"You don't give out a report and ask for consent later," Kaneshiro said. "His (Marsland's) analysis has a lot of fallacy."

But he said the attorney general's office won't be pursuing the violation because he doesn't want the investigation into the leak of the report to be "sidetracked."

and other organizations just days before the Sept. 20 primary election.

Heftel has blamed his defeat on Lt. Gov. John Waihee in the Democratic gubernatorial primary election on the leak of the report and the "whisper campaign" against him.

Marsland said he has no doubt that the attorney general's office wants to point to the prosecutor's office as "the source of the leak."

But Marsland noted that the report is "unique. I've never seen anything like it. It's pure garbage, pure hearsay. Nothing in it can be used."

Although the prosecutor's office has a policy generally against disclosing documents, the release of this report is different, he said.

LUCK FOUND the report in a file cabinet in an office that had been vacant for about two years, Marsland said. It had been the office of former prosecutor's aide Rick Reed, who had moved to another office, he said.

This means two copies of the report had been made by the prosecutor's office after state narcotics agents presented the document to Marsland about three years ago, he said.

Marsland had previously said he knew of only one copy of the report which he said he kept locked in his safe.

Reed, a Maui candidate for a state Senate seat, yesterday said that he doesn't recall having a copy of the report in his office and that he moved four or five times during his time at the prosecutor's office.

"I wouldn't be surprised if I did have a copy of that document in my files. I was an investigator and the prosecutor's chief aide. What would you expect to find in law enforcement files — recipes?" Reed said.
MARSLAND brushed aside reporters' questions about the privacy of the 30 other people named in the report by the state Investigations and Narcotics Control Section of the Department of Health.

First, he said, he would be willing to give copies to them, but then pulled back on the statement, saying it might not be a good idea.

"I can't condone Rob's actions, but neither can I accept the resignation that he tendered this morning," Marsland said during a news conference. "Rob tried to make the victim aware of the instrument being used to destroy him. He did not pass around nor mail out the report."

Luck just "made an error in judgment," Marsland said. "If Rob has a fault, it is in the fact that he is a decent and caring human being, and he was once again trying to help someone who was being deliberately hurt."

COPIES OF THE report about Hefelt's personal life were sent anywhere to the news media, various campaign headquarters

that I left the document behind shows how little importance I attached to it," Reed said.

A SURVEY DONE by Waimea's campaign supporters on Sept. 28 included a question about who some people thought might have been responsible for the smear campaign against Hefelt.

Attorneys Warren Price and Sharon Himeno drafted the survey form and distributed copies of it to non-attorney employees within the kamaaina Republican law firm.

Himeno said it was just an attempt to see how workers in the law firm responded to Waimea's candidacy since they seemed to represent a cross-section of the community.

If people thought Waimea was somehow responsible for the smear campaign, then there might be a need to get advertising to dispel the false impressions, Himeno said. But the results of the survey were mixed, she said, and not a lot of the workers responded to it.
Release of 'Smear' Report Violated

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Continued From Page One

fire or suspend Luck. There are no criminal penalties for such a

slander, he said.

Luck today acknowledged that he knew his action was "clearly

a violation" of administrative procedures and possibly of the

state's privacy code.

He said he would offer Mars-land and his resignation today.

Luck said he had discussed the matter last week with Mars-

land before he was scheduled to meet with attorney general's

investigators who are trying to find out who leaked and distrb-

uted the document.

"He (Marsland) said I shouldn't have done it. It was wrong,"

Luck said.

CHRIS HEFFEL said Luck gave him the report because "he

knew there were rumors out there and that we were being

victimized by them and it was unfair and that we should be

told."

"Luck made it clear that he was doing it on his own without

Marsland's knowledge or permision."

Chris Heffel added: "We were aware of real sick rumors and

this at least gave an explanation as to where the rumors were

coming from. It also was reassuring that if anyone made a public

accusation that there was a person who would back us up."

He described Luck's move as "an honorable gesture and

should not cloud the issue of who deliberately and premedita-

tely attempted to ruin my fa-

ther's reputation."

Luck said he took the action because he didn't think it was fair

that the report should be used against Heffel.

"I had heard from my own sources that other people had

copies of it outside the office and that someone may try to use

it against Coc," Luck said. "I didn't think it was fair and he

should know about it, that it was an uncoordinated reporting."

LUKЕ LAID out the report to Chris Heffel about Aug. 22.

Marsland didn't know about as he released he said.

Copies of the report were sent to Coc.

Heffel's personal life were anonymous was a party to

media-campaign organizations and other groups just days be-

fore the primary election.

Heffel has said the information in the report isn't true and

blamed the leak of the document and the "whisper campaign"

against him for his loss in the election to Democratic Lt.

Gov. John Waihie.

Heffel believes that Waihie and Republican D.G. Andy

Anderson were responsible for the dissemination of the smear

campaign. Both gubernatorial candidates have denied the ac-

cusation and also have discounted Heffel's belief that the smear

campaign caused his defeat.

Waihie today said he was sur-

prised by Luck's disclosure and

recommended that the state law

should be changed so that crimi-
nal penalties are levied against

anyone who leaks a confidential

report.

"It would seem to me from what I know that it was unfortu-
nate that security over the docu-

ment was such that anyone could get to it and pass it around. We need to ensure that kind of access is no longer available,"

WAIHIE SAID that if he is

re-elected governor, he will push

for a law similar to a statute

governing the Hawaii Criminal

Justice Commission that makes it a felony to release any docu-

ments of a confidential nature.

At Waihie's urging Watanabe is investigating the leak and

expects to have her report completed before the Nov. 4 general

elections. Yesterday, her office

sent more documents to the FBI

for scrutiny by its criminal la-

boratory.

Luck said his family and Chris

Heffel's family have known each

other for a long time and the families were in the spreading in-

dustry. "I thought it was

very possible that the report was

available to both Democratic and

Republican campaigns. It was

over to friends and co-workers who

didn't have direct knowledge of

it," Luck said.

He declined to say who might have a copy of the report out-

side the prosecutor's office be-

cause it might affect the attor-

ney general's investigation.

LUKЕ LAID out the report to Chris Heffel because he heard others had copies of the report and were planning to use

it against Heffel.

Watanabe said it will be up to

the city prosecutor to decide whether to turn over the

report.
Confidential Records Ordered

Kept from Abuse Defendants

by James H. Rubin
Associated Press

WASHINGTON — The Supreme Court, citing the "vulnerability and guilt" of sexually abused children, said today that people accused of abuse are not entitled to see confidential state records to help defend themselves.

In a 5-4 ruling, the justices said the Pennsylvania Supreme Court mistakenly ordered child welfare officials to reveal confidential records to a man accused of raping his young daughter.

All 50 states and the District of Columbia have confidentiality laws governing allegations of sex abuse.

IN ANOTHER criminal justice decision, the court said honest mistakes by police officers may excuse what otherwise would be an unconstitutional search of someone's home.

The 6-3 decision apparently reinstated a Baltimore man's heroin-peddling conviction and 15-year sentence.

The court said police made an honest mistake when they searched the man's apartment, relying on a search warrant for the adjoining unit that shared the same hallway.

In the child-abuse case, the court said states must be allowed to shield confidential files from defendants and their lawyers.

"Child abuse is one of the most difficult crimes to detect and prosecute," in large part because there often are no witnesses except the victim," Justice Lewis F. Powell wrote for the court.

"A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent," he said.

"It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurances of confidentiality."

BUT POWELL said the records in the Pennsylvania case should be examined in private by a trial judge to determine whether they contain information that might help exonerate the father, George F. Ritchie.

Ritchie's conviction, set aside by an appeals court, should be reinstated if the trial judge does not find evidence to clear him, today's ruling said.

Allegheny County prosecutors sought to withhold the information from Ritchie and his lawyers.

Ritchie was convicted in 1979 of rape, incest and corrupted morals of a minor for alleged sexual contacts with his daughter over a four-year period beginning when she was 9.

State appeals courts set aside the conviction because the state's Children and Youth Services, an agency created to investigate child-abuse charges, had withheld its records from Ritchie.

The state courts said the files should be examined to determine whether they contain information that might clear him.

RITCHIE SAID the files might contain the names of witnesses favorable to him or a medical report that might contradict his daughter's allegations.

Powell said Ritchie was not entitled to have the records perused by his lawyer from "the perspective of an advocate who may see relevance in places that a neutral judge would not."

Chief Justice William H. Rehnquist and Justices Byron R. White, Sandra Day O'Connor and Harry A. Blackmun joined Powell in the majority.

The four dissenters said the high court never should have agreed to hear the case because the Pennsylvania Supreme Court ruling did not put an end to the case but rather ordered further proceedings.
Records Ordered Sealed in Eagleson Theft Trial

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By Lee Cotterill
Star-Bulletin Writer

Over defense objections, a state judge has sealed certain records in the theft trial of former state Democratic Party official C. Douglas Eagleson.

Circuit Judge Donald Tsukiyama yesterday said public access to the records in question would infringe on the privacy rights of people named in them.

Eagleson, 34, is charged with 12 felony counts of theft and forgery. He is accused of taking nearly $50,000 in unauthorized payments from the party’s candidate-assistance fund in 1986 when he was program director.

EAGLESON has said former party Chairman James K. Yamagishi authorized the payments as salary advances.

Deputy Prosecutor Paul Goto last week asked the judge to stop defense attorney Boyce Brown from asking witnesses certain questions about their personal lives.

In granting Goto’s request, Tsukiyama yesterday also sealed both Goto’s written motion and Brown’s written response.

“The purpose is to protect the rights of individuals against unwarranted allegations,” Tsukiyama said.

An attorney for the Star-Bulletin argued unsuccessfully that the documents should be made public because they are part of the record of the trial.

Attorney David Deitzel said there was no precedent for a judge denying public access to documents in a trial except in special circumstances, such as a rape complainant’s sexual history or information that would deny the defendant a fair trial.

BROWN EXPRESSED concern in the hearing that attempts to protect people’s privacy could block important testimony that would “stop on the toe of the power that be.”

Eagleson’s trial “involves a number of prominent people,” Brown pointed out.

Citing prior news media coverage of pretrial rulings in the case as a factor in his decision, Tsukiyama today individually questioned jurors to determine whether they had been influenced by news reports.

None was excused and testimony began as scheduled.

The judge ruled last week that jurors are not to be told about any gambling debts that Eagleson may have had.

Brown said his decision whether to challenge Tsukiyama’s decision to seal the documents may depend on the outcome of the trial.
Pro and con arguments heard on electing attorney general

By Jerry Burris
Advertiser Politics Editor

E lecting an attorney general in Hawaii could lead to more not less, political influence in the state’s top legal office, state Attorney General Warren Price said yesterday.

Price testified before Sen. Clayton Hee’s Judiciary Committee on legislation that would authorize election of the state’s attorney general. Currently the attorney general is appointed by the governor with the advice and consent of the state Senate.

Deputy City Prosecutor Tom Pico Jr., testifying on behalf of Prosecutor Charles Marsland, said, however, that an elected attorney general would help “balance out the great, great power” of Hawaii’s governor.

Price argued that an elected attorney general could become a “runaway” more intent on his or her own political ambitions than service to the state. Pico contended that the “main check and balance” on a runaway attorney general would be “the scrutiny of voters on election day.”

Hee said later he wasn’t convinced by Price’s arguments, and at this point leans toward recommending a move toward an elected attorney general.

A switch to an elected attorney general would require an amendment to the state Constitution that would have to be approved by the voters.

On another topic yesterday, Hee’s committee was strongly urged to rewrite state law so that it will be a criminal offense to disclose investigative or intelligence information generated by government.

The legislation was spurred by the controversy surrounding the leak of a state drug investigation report during the waning days of the 1986 gubernatorial campaign. The report contained unsubstantiated allegations about Democratic candidate Cec Heftel, who said release of the document helped a “smear” effort that cost him the election.

Hee turned out that unauthorized release of such documents may not, in itself, be a criminal offense.

Support for the legislation came from the Attorney General’s Office and from the Honolulu Police Department.

But the citizen public interest group Common Cause warned that the proposal could be “extremely damaging” to the public’s right-to-know about government operations. Common Cause Executive Director Ian Lind said the broad wording of the bill could, if enacted, force government officials to keep all manner of public information in locked files.

Deputy Attorney General Keiichi Kaneshiro argued, however, that “it is essential that the integrity of the (criminal) information gathering process not be polluted as it was during the last gubernatorial campaign.”

Reaction from committee members suggested that the bill may be reworded to more narrowly define what information could not be released, and then increase the criminal penalty from the proposed misdemeanor to a felony.

Review of privacy, public records laws

Gov. John Waihee will soon name a special committee to review Hawaii’s laws on public records and privacy, administration officials told lawmakers yesterday.

Robert Ain, director of the Department of Commerce and Consumer Affairs, asked the Senate Government Operations Committee to hold off action on a proposed Uniform Information Practices law until the review is completed.

Alm acknowledged there is confusion and controversy over what state information is public and what is not. But he said a rewrite of the code should wait until Waihee’s committee can finish its work.

Within a week, Alm said, a committee made up of news media representatives, public interest groups and business and government officials will be named.
Panel Named to Review Law on Public Records

By Gregg K. Kokesako
Star-Bulletin Writer

Gov. John Waihee today formed a nine-member committee to review the state's public records law.

Included on the panel are Star-Bulletin writer Sterling Morita, who also is president of the Hawaii Committee for Freedom of the Press, and KHON-TV news reporter and managing editor-assignments Jim McCoy, a former Star-Bulletin writer.

Other members are Attorney General Warren Price; state Commerce Director Robert Aim; Associate Justice Frank Padgett; Star-Bulletin attorney David Dezzani; Andrew Chang, former city managing director and now manager of Hawaii Electric's government relations department; Ian Lind, executive director of Common Cause; and Duane Brenneman, vice president and general manager of Nisshin Hawaii and chairman of the Motor Vehicle Licensing Board.

The gubernatorial commission will examine the current privacy law and related laws; hold public hearings; and suggest alternatives. The panel will report to the governor.

RUSSELL BLAIR, Senate Government Operations chairman, yesterday postponed action on a bill that would have spelled out the public's right to inspect government records.

It was supported at yesterday's hearing by Lind, who said that Hawaii's Privacy law has been so broadly interpreted by the state and four county governments that "the public is being denied access to public records when no personal or private information would be jeopardized by disclosure."
Gov. John Waihee acknowledges that the state's privacy law may be "too restrictive," so he is thinking about forming a committee to determine what can be done to change it.

"I think the question that has to be answered right now is what are the limits of the state's privacy law?" Waihee said.

As it is now interpreted by state officials, including the governor's office, information such as resumes and salaries of all city and state officials are considered confidential.

House Judiciary Chairman Wayne Metcalf believes that's going too far and wants to enact legislation that would make resumes and government salaries public information.

But he wants to hold up on further revisions until an interim study can be done.

Waihee yesterday told reporters that he still wants lawmakers to pass a law this session that would make it a crime to leak confidential state documents.

SENATE JUDICIARY Chairman Clayton Hee also wants the changes to be made in this session.

In fact, Hee wants to go even further than the state administration. He wants the unauthorized release of confidential state documents be classified as a felony rather than a misdemeanor. This would mean a maximum penalty of 20 years in prison and a $10,000 fine.

House Judiciary Chairman Metcalf disagrees.

He wants to delay work on Waihee's request until after a complete study has been done this summer on the state's privacy law.

Waihee's proposal stems from the 1986 gubernatorial election in which he upset Democrat Cec Heftel in what has been described as "the dirtiest" political campaign to date.

Heftel "claims he lost the Democratic nomination to Waihee because of a smear campaign which included the leak of a confidential state Health Department report two days before the Sept. 20 primary.

The report contained unfounded allegations about Heftel's sex life and also accused him of being a drug user. An informant gave that information to state investigators in 1983.

FORMER HONOLULU Police Chief Francis Keala has volunteered to review without pay the findings of an attorney general's investigation which was begun shortly after the September primary. Its findings, released just before the Nov. 2 general election, were inconclusive.

Both Keala and state Attorney General Warren Price have acknowledged that under existing law unauthorized disclosure is not a criminal offense. However, a state employee could be suspended or fired from his job.

Waihee and Hee yesterday reiterated that they want to make the unauthorized release of state documents a crime.

But Metcalf maintains that he is concerned about the fine line that separates the right to privacy and the right to know.

"I don't want to go willy-nilly into this problem without a thorough study of it," Metcalf said. "It is too important."

Common Cause/Hawaii also is worried that Waihee may be overreacting.

Ian Lind, local Common Cause/Hawaii director, has described Waihee's proposal as "dangerous because it appears to establish a mindset and an approach that looks to close off access to information even though it may be well intended."
Privacy Law 'Overhaul' Put on Hold

By Gregg K. Kokeshoko
Star-Bulletin Writer

House Judiciary Chairman Wayne Metcalf wants to delay work on the state administration's request to make it a crime to leak confidential documents like the report containing damaging allegations against former U.S. Rep. Cec Heftel.

"This is because the line of delineation between two important competing rights — the right to privacy and the right to know — is very fuzzy," Metcalf said yesterday. "I don't want to go willy-nilly into this problem without a thorough study of it. It is too important."

Instead, Metcalf wants to undertake — between the end of this session in April and next January — what he calls "a broad reconstruction" of the state privacy law.

COMMON CAUSE is also worried that Gov. John Waihee may be overreacting to the so-called Heftel smear with legislation that would make it a criminal offense to leak state documents.

Ian Lind, director of Common Cause/Hawaii, said yesterday that such a piecemeal approach is "dangerous, because it appears to establish a mindset and an approach that looks to close off access to information even though it may be well-intended."

Lind warned of the establishment of a document classification system, something like the military's confidential and secret categories.

"This is something with broad implications that no one may realize as yet," he said, adding:

"It is especially bad in light of current legal interpretations where virtually everything could be confidential from salaries of public officials to actions taken by agencies on contracts."

"Anything that has a person's name associated to it could be termed confidential. The combined effect could virtually end all access to public records."

THE ADMINISTRATION bill stems from the 1986 gubernatorial campaign, which has been described as "the dirtiest in the history of the state" because of a smear campaign aimed at discrediting Heftel.

Former Police Chief Francis Keala has agreed to work without pay to find out how the contents of a confidential state health narcotics enforcement report were leaked to the media two days before the Sept. 20 primary election.

Keala has been promised cooperation of both state Attorney General Warren Price and city Prosecutor Charles Marsland.

An earlier state attorney general's investigation, begun after the September primary, was inconclusive.

Heftel blamed his defeat by Waihee in the Democratic primary on unauthorized disclosure of the contents of the report, which contained unfounded allegations about his personal life.

The information was given to state investigators by an informant more than three years ago.

Keala and Attorney General Price have acknowledged that under existing law it is not a criminal offense for unauthorized disclosures. However, a government employee could be subject to disciplinary action by his employer.

METCALF SAID that at this point, pending the interim study, he will only do "limited reconstruction" to the state's privacy law. This involves opening up the privacy law so that resumes and salaries of public officials are public record.

Last month the city refused to disclose the resume of new city Parks Director Hiram Kamaka, saying such documents are confidential.

His resume became a crucial factor because questions were raised on whether he was qualified for the $60,000-a-year job.

Waihee also has hidden behind the shield of the privacy law, refusing to release specific salary figures of his key aids. Instead, his office merely makes public the salary range of the jobs.
Judge Au Won't Permit Viewing of State Settlement Agreement

By Stirling Morita
Star-Bulletin Writer

A Circuit Court judge has reversed himself and refused to allow Hawaii painting industry officials to see state government documents on disciplinary action involving a contracting company.

Judge Richard Au yesterday ruled that the state privacy code forbids the release of a settlement agreement kept by the Department of Commerce and Consumer Affairs. The judge previously ruled that the agreement was a public document.

After the hearing, Michael Lilly, attorney for the Painting Industry of Hawaii, said the judge's decision could mean that government attorneys could keep the public from seeing any records that have individuals' names in them and aren't specifically declared public records in the statutes.

Lilly will recommend that his client appeal the decision. The trade association needs the information because it monitors contractor activities for its recovery fund, he said.

State attorneys had asked Au to reconsider his previous decision, saying the privacy code forbids disclosure of personal information.

NATHAN SULT, an attorney for the state agency, told the judge that the settlement agreement contains information about Donald Tagawa, an official of Metropolitan Maintenance Inc. Therefore, Sult said, the agreement shouldn't be made available.

But Lilly argued that the documents relate to a company working on a public contract that was paid with taxpayers' funds. "I don't know what the secrecy in this case is all about?" Lilly said.

Lilly said the government's actions in this case were like "Watergate-type stonewalling.

"Just because you have a name in a document doesn't make it a private document," Lilly told the judge.

The privacy code is designed to protect "clearly private information" about private activities and private individuals, he said.

But Sult argued that the state Legislature enacted a "broad policy to protect privacy rights of the individual."

Lawmakers didn't make exceptions for individuals involved in public activities, Sult said.

Lilly said the public has a right to know what state officials are "doing about public activities." If public access to such documents is cut off, there are no guarantees to the public that the government process is working, he argued.
Sex Harassment

Case File Open

A state judge has refused to reverse his earlier denial of a request to cut off public access to a lawsuit against Andrade and Co. stemming from the firing of two employees.

Circuit Judge Robert Klein yesterday rejected the argument that open documents would generate publicity damaging to Andrade executives Harvey Lazar and Frank Geiger.

The suit contends that Geiger, the company's president, fired employees Betty Lizama and James Shirley in May for complaining that Lazar, its vice president, had been sexually harassing women employees.

Klein ruled in December that the public should have access to the file of the case.

The judge said Andrade executives could speak with news reporters if they are concerned about publication of unbalanced articles.
Parks Chief Makes His Resume Public

By Peter Wagner

The city's new parks director yesterday released copies of his resume to the public despite the administration's position that resumes of government officials are confidential.

Hiram Kamaka, who this month took over as director of the Department of Parks and Recreation, said he released the information against the advice of the city's top attorney out of indignation that some have questioned his qualifications for the $56,000 job.

"I still don't feel I have to release the information," he said. "But I kind of felt hurt. I see myself as someone who has given years of public service."

BUT COMMON CAUSE, a non-profit group recently seeking the resume, says the city's continued position against release of such information is a sinister threat to public access to government dealings.

In a letter last week to Common Cause/Hawaii Director Ian Lind, City Corporation Counsel Richard Wurdeman said Kamaka's resume is "clearly a personal record" and therefore not public information.

Lind yesterday received another letter from Wurdeman, reiterating the position that employment records of public officials are private information.

"They seem to still be saying that, as matter of city policy, you still don't have a right to know these things," Lind said. "The implications of that are far more serious than the issue of Kamaka's qualifications."

Regarding qualifications for the parks directorship, the City Charter says the director "shall have a minimum of five years of training and experience in a parks and recreation position or related fields, at least three of which shall have been in a responsible administrative capacity."

KAMAKA'S RESUME says he was a territorial legislator, state finance director, delegate to the 1968 Constitutional Convention, an officer of a management firm, and has had memberships or directorships in several athletic associations, including:

- Kahaluu Little League.
- Central YMCA.
- Oahu Bowling Association.

The resume also notes that, while finance director, Kamaka oversaw the Hawaii Stadium Authority.

Wurdeman said in a Jan. 19 letter to Lind that Kamaka is qualified, according to the "generally accepted principle that qualifications for public office should be construed broadly."

BUT LIND remains skeptical.

"I see no professional training in a recreation-related field, and only indirect experience," Lind said. "It doesn't seem to meet what the City Charter intended."
City Finance Chief Sworn In

New Director Praised for Her Experience

By Peter Wagner
Star-Bulletin Writer

Linda L. Smith, a former White House budget analyst, today was sworn in as the city's new finance director.

Smith, 39, who recently has been director of data programming at Pearl Harbor, replaces Bizalino Vicente, who fell into disfavor with Mayor Frank Fasi before being asked to resign a month ago.

"We're very lucky to have someone with her experience," Fasi said during the ceremony in his office.

The mayor last night issued a brief statement saying Vicente's departure was due to "philosophical differences between the two — not to transgressions or poor work performance."

FASI CURTLY ended the ceremony, cutting off questions from reporters.

Smith, who came to Hawaii four years ago, volunteered copies of her resume to reporters on hand.

The action could indicate a new administration policy whereby resume information of city officials is considered confidential — unless offered by the official in question.

The matter became an issue when the city's top attorney repeatedly refused a request from a citizens' group for the resume of Hiram Kamaske, the new public director. Corporation Counsel Richard Wurdemann said such information is protected from public scrutiny by privacy laws.

Smith's resume says she most recently was director of the data programming department at the Navy Data Automation Facility at Pearl Harbor.

PREVIOUSLY, she was budget analyst in the White House Office of Management and Budget (1975-79); special assistant to the chairman, U.S. Congress, committee on budget (1973-77); director of the Executive Secretariat, U.S. Department of Transportation (1977-79).

Also, director of administration, White House Office of Budget and Management (1976-82); director of technical information, Agency for International Development (1962); customer liaison staff, Navy Data Automation Facility; and subsequently director of data processing and programming at Pearl Harbor.

Smith's appointment is the latest in a series of recent changes Fasi has made in his cabinet. She will begin work at city hall Monday.

Vicente, who said he was asked to resign, has accepted a job as assistant to the president of the Wellington Financial Corp., a Honolulu-based firm publishing the Wellington Letter.

THE MAYOR said in a written statement last night that "earlier reports that Mr. Vicente was being terminated because of poor management and questionable hiring practices were untrue."

The mayor apparently was referring to a televised news report indicating Vicente was overzealous in hiring fellow Filipinos in the department.

Vicente, a former financial adviser with Merrill Lynch, was a strong supporter of Fasi during the 1984 mayoral race and helped draw the Filipino vote to Fasi. He was one of several Filipinos subsequently appointed to cabinet posts in the administration.
A state judge yesterday denied a request to seal public records in a civil court case, rejecting the argument that they may contain false allegations that could hurt the business reputation of Castle Medical Center.

Circuit Judge Robert Klein's office notified attorneys that he was turning down Castle's attempt to close the case involving a lawsuit filed by a former employee against the hospital.

During a hearing Tuesday, Castle attorney Jared Jossem also asked that the attorneys first be permitted to decide which portions of court documents should be public before they are filed. If they can't agree, then Klein could rule on a document-by-document basis, Jossem suggested.

Klein indicated he was concerned that he would be setting precedent resulting in a judge reviewing each filing in every civil case. "Isn't that a little ridiculous?" Klein asked.

John Rapp — attorney for former employee Marian Miller, who wants the file kept open — hailed Klein's decision as "correct" and "in favor of the rights of the public."

"If you didn't have this ruling, you'd be, in effect, back in the days of star chambers and secret proceedings," Rapp said.

Jossem could not be reached for comment.

Miller's lawsuit alleges that she was suspended and forced to resign after she assisted a patient who she says was mistreated by the hospital. Castle has denied the allegations and filed a $10,000 counterclaim alleging, among other things, that Miller slandered the hospital.

The case is still pending.
Judge to rule on closing files

Circuit Judge Robert Klein is expected to rule this week on whether files in a civil case should be sealed because they may contain false claims that could hurt business and personal reputations.

Castle Medical Center has asked Klein to seal pre-trial public records involving a lawsuit by a former hospital employee. During oral arguments yesterday, Klein also was asked by Castle’s attorney, Jared Jossem, to let attorneys for both sides review documents 10 days before their submission to court to see if they can agree on whether additional documents should be sealed or left open to the public.

If the attorneys can’t agree, Jossem said Klein can rule on a document-by-document basis.

Klein said he was concerned that if allowed Jossem’s request, it would set a precedent requiring similar procedures for every single filing in every single case. “Isn’t that a little ridiculous?” Klein asked.

Attorney John Rapp, who is representing a woman who was fired from Castle after she helped a patient file a complaint against the hospital, opposed Jossem’s request.
Court issue: whether to seal records in civil cases

SUN JAN 25 1987 AD

By Ken Kobayashi
Honolulu Advertiser 

Castle Medical Center is asking a state judge to seal pretrial public records involving a lawsuit filed by a former employee because her allegations may affect the "business reputation" of the hospital.

Attorneys for Castle say the allegations are "scandalous" and "false and potentially libelous."

The former employee's attorney, however, says Castle is too much different from other defendants who get sued and, if they all had their way, then public records for those cases also would have to be kept secret.

Attorney John Rapp said his client and the public "have a right to ensure the judicial proceedings remain open."

Circuit Judge Robert Klein is scheduled to hear Castle's request Wednesday.

In a separate case, a manager at a department store has filed a similar motion to seal records relating to a lawsuit filed against him. Klein earlier rejected a request to seal the documents, but has been asked to reconsider his decision on Feb. 3.

The two attempts may be the first here seeking to close civil court files based on claims that they contain false allegations that hurt business and personal reputations.

Attorneys connected with the case say they do not recall similar requests in the past, and that they believe the Hawaii Supreme Court had not "ruled on whether civil files can be sealed.

If the two attempts are successful, media attorney Jeffrey Portnoy, whose clients include The Honolulu Advertiser, said he fears such actions would establish a "very serious trend toward secrecy in the court system, which the Constitution indicates shouldn't be tolerated."

Castle, its owner Adventus Health System-West, and Chris Talmadge, unit manager and assistant director of nursing in the psychiatric department of the hospital, were all sued in Superior Court by Marian Miller, a former part-time counselor in the department.

The lawsuit alleges that Miller was suspended by Talmadge and forced to submit a letter of resignation from her job last November after she assisted a patient who complained about the treatment by a hospital employee.

"Miller's lawsuit seeks unspecified amount of damages and back pay."

In response, Castle and the other two defendants denied any wrongdoing. They said Miller had not performed her work satisfactorily.

Castle also filed a counterclaim alleging, among other things, that Miller slandered the hospital. It asks for at least $410,000.

In seeking to seal the court file, Castle said courts have recognized that judges can seal court records "if the public's right of access is outweighed by competing interests."

"If false, uncorroborated and potentially libelous statements about a hospital's staff, such as the ones in the instant case, are permitted to circulate publicly, by press or otherwise, Castle will suffer irreparable and substantial damages to its business reputation and subsequently to its business operations even though there has been no adjudication of the issues in the lawsuit," Castle's attorney, Jared Roesel, said in his written request.

In response, Rapp said it has been established that his client's allegations are "false." Therefore, he said, the judge should "ruled that they be stricken from the record."

Rapp also said any civil defendant could claim that the allegations against the person are false.

"Physicians who are accused of professional malpractice, individuals who are accused of rape and defendants accused of fraud will all be protected by this new rule," Rapp said.

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Judge Seals Probe of Art Gallery

Says Files Are Not Public Record, Denies Star-Bulletin Access

By Lee Conferrow
Star-Bulletin Writer

A state judge has refused to require the attorney general's office to disclose a two-year fraud investigation of a major Honolulu art gallery that resulted in a criminal complaint being drawn up but never filed.

Circuit Judge Robert Klein ruled yesterday that the Star-Bulletin cannot have access to the five-year-old closed file involving Center Art Galleries-Hawaii because such files, he said, are not public record.

Former Deputy Attorney General Robert Miller, who headed the probe, did not testify at yesterday's hearing.

But outside of court he confirmed that he prepared a formal complaint against Center Art Galleries-Hawaii in 1981, brought it to then-Circuit Judge Arthur Fong's chambers and later withdrew it.

He declined to say why he withdrew it or who told him to withdraw it, saying those questions were "a matter of privileged, attorney-client communication." He said he considered his client to be the attorney general.

Common Cause Director Jan Lind called Miller's withdrawal of the complaint "a very unusual occurrence" that has "the appearance of impropriety.

He said the file's disclosure is needed to "put a check on improper, political interference" of an attorney general's investigation.

The attorney general's office has said the file contains a memorandum from a state agency to Gov. George Ariyoshi, among other things.

Robert Miller
Matter of privileged communication

Liad said the complaint apparently was not withdrawn so it could be redrafted because it never was refiled.

"It was simply killed, at least from what's on the record now," he said.

Such a "radical shift" in the attorney general's position on a case would not have been made "except on orders," Lind contended. "Not when it's gone that far."

ART EXPERTS recently have questioned the authenticity and value of graphic prints sold by Center as "original" lithographs of Dali and Marc Chagall.

Three former Center employees have said they were told by Center management that Dali did the work on master plates used in making lithographs attributed to him.

Art experts say prints produced from plates the artist did not touch amount to posters worth less than $100. Center Art has been selling the prints for thousands of dollars each.

Star-Bulletin attorney David Dezzani told Judge Klein that Miller and two other deputy attorneys general signed the complaint. According to court rules, such actions are taken only when the deputy has determined there are good grounds to support the contention that the defendant has violated state law.

The public is entitled to know what was going on in the attorney general's office," Dezzani told Klein in asking for access to the three-inch file.

DEPUTY ATTORNEY General Grant Tanimoto did not deny that the complaint had been withdrawn. But Tanimoto called the Star-Bulletin's request for the file "a fishing expedition" that, if allowed, would have a "chilling effect" on other investigations by his office.

Alluding to disclosure of the attorney general's investigation of the Dee Helfet "smear" document, Judge Klein agreed that revealing confidential statements "can have a devastating effect."

The Star-Bulletin has yet to decide whether to appeal Klein's ruling, Executive Editor John Simmons said.

THU NOV 27 1986 SB H
The OTA report criticizes the Office of Management and Budget, which was bestowed in 1974 with the chore of overseeing the Privacy Act. OMB never has updated the act to deal with cross-checking. OMB officials contacted yesterday said they had not seen the report and had no comment.

With no updated directive, agencies interested in finding out if recipients of veterans' benefits are also federal employees who may not be qualified for the payments need only check the appropriate records.

"Under the Privacy Act, information collected for one purpose should not be used for another purpose without the permission of the individual," the report said.

"HOWEVER, A MAJOR exemption to this requirement is if the information is for 'routine use' — one that is compatible with the purpose for which it was collected." But with no interpretation, "this has become a catch-all exemption permitting a variety of exchanges of federal agency information."

The report also warns that such use makes it harder for individuals to check the content of their files to make sure the information they contain is correct. In addition, trading files between departments makes the data susceptible to security leaks.

Another problem with the system is that by looking for a combination of characteristics that may typify a welfare cheat or a tax evader, for example, it may result in "people being treated as suspect before they have done anything to warrant such treatment, and without their being made aware of being singled out," the report said.
Attorney General: UH Salary Release Legal

By Sterling Morton
Star-Bulletin Writer

Attorney General Corinne Watanabe says Sen. Neil Abercrombie didn't violate the state privacy code when he released weekly salary figures to newspapers to discuss salary increases for top University of Hawaii officials.

Abercrombie's action three weeks ago was proper because the privacy law doesn't restrict lawmakers, Watanabe said yesterday. "I don't think what the senator did was illegal."

The attorney general's office has said salaries of government employees shouldn't be released to the public because they are personal information under the privacy code.

Abercrombie has said the public is entitled to know how much of the state's taxes are going to pay individuals.

Two of the 12 UH executives whose salaries were disclosed by Abercrombie have said they didn't feel their rights to privacy were violated. But, they said, Abercrombie should amend the law if he feels it's wrong.

WATANABE said the privacy code restricts government agencies, not lawmakers. It is the person or agency in charge of the records who is barred from releasing private information, she said.

The privacy code has criminal penalties for the improper release of private information, she said.

UH President Albert Simone gave the salary figures to Abercrombie based on a request by the Senate Higher Education Committee. The information was marked "confidential."

But Watanabe said Simone didn't violate the privacy code either. The law permits administrators to give private information to legislators, she said.

The privacy code has criminal penalties for the improper release of private information, Watanabe said that provision caused administrators to "be cautious" about releasing information "preferring to err on the side of safety."

Under the current law, government officials probably would want a court to decide whether to release information to the public, she said. This means a person asking for information might be forced to file a lawsuit.

Government agencies and the attorney general's office have problems with the privacy law, she said. There is a statutory link between the public record law and the privacy code prompting a conflict between the two sections, Watanabe said.
No Rights Violated in Pay Disclosure, UH Leaders Say

Two University of Hawaii vice presidents say their rights to privacy haven’t been violated by recent disclosure of their salaries.

The public should know how much of its taxes goes to paying such top-level officials, they said.

"In public service, accountability is different than in private industry," said Anthony Marsella, acting UH vice president for academic affairs. "There is a legitimate public question: Are you worth the salary you’re getting paid to do the job you’re supposed to?"

"Hopefully, within time, people will say I’m worth 10 times my salary," Marsella said.

BUT THE attorney general’s office says the public doesn’t have the right to know such personal details about government employees because of the state privacy code.

"Sen. Neil Abercrombie has challenged that legal opinion and released the public information on the pay of 12 UH executives. "The public is entitled to know what people on the public payroll are getting," he has said.

Asked two weeks ago about Abercrombie’s action, Attorney General Corinne Watanabe said she would study the matter and promised to answer a reporter’s questions. But she has yet to answer them.

A BILL passed by the Senate last year revamps the privacy code and now is in the House Public Employment and Government Operations Committee. Its supporters say the measure will allow the release of government salaries and important information about those paid from the public.

Ian Lind, executive director of Common Cause/Hawaii, said, "The privacy law was never intended to eliminate what had previously been a public record."

In our view, the salaries of public employees traditionally have been of public record.

"What Abercrombie did was totally appropriate because the attorney general should have done it in the first place," said Lind, a major supporter of a change to the privacy code.

Melvin Higa, deputy director of the Hawaii Government Employees Association, said the white-collar workers’ union feels that public employees’ salary information should remain private.

Harold Masumoto, UH vice president for administration, said the difference between the ethics and privacy codes "is really silly."

UNDER THE ethics code, Masumoto must publicly disclose the public has a right to know what its public officials earn but... "on the emotional side, I felt a bit of a twinge when I saw my name emblazoned in a headline as being Simone’s highest paid aide."

—Anthony Marsella

"everybody owe money to," he said. But under the privacy code, taxpayers can’t find out Masumoto’s salary, he said.

Because of that, "salaries should be released. It’s the logical thing to do," he said.

Masumoto has "no problem" with the disclosure of his $65,604 salary, but added: "I’m disappointed that a state senator would not obey the law... He’s bound by it. If he doesn’t like it, he should change the law."

UH President Albert Simone gave a list of salaries of University executives to Abercrombie with a warning that the figures were confidential. Abercrombie released the list to the news media.

Marsella, who topped the list with a $71,748 salary, said the Democratic senator’s action "is acceptable to me, but he should change the law."

The public has a right to know what its public officials earn, Marsella said. "Fine, I accept that," he said.

But "on the emotional side, I felt a bit of a twinge when I saw my name emblazoned in a headline as being Simone’s highest paid aide," Marsella said.
Court upholds Big Island law on disclosures

The Hawaii Supreme Court yesterday upheld the Hawaii County law requiring financial disclosure statements by about 70 county employees involved with regulatory functions.

In the unanimous opinion, the high court held that the requirement does not violate the state Constitution's right-to-privacy guarantee.

It upheld Big Island Circuit Judge Ernest Kubota's ruling last year throwing out the suit challenging the requirement. The suit was filed by county planner Rodney Nakano on behalf of himself and other regulatory employees.

The high court said the code of ethics which spells out the disclosure requirement is mandated by the state Constitution and Nakano and the other employees are covered by the code provisions.
10 years of sunshine

Ten years ago this month, bearing the signature of Governor George Ariyoshi, the state's new "sunshine law" went into effect. Designed to rectify ambiguities in policies relating to state and county meetings, the law was the culmination of a long effort to ensure more openness in government.

Unfortunately, in the decade since its passing, the law has time and again shown its limited utility. To be sure, the law has tightened regulations under which a meeting can be closed. But since 1975, the public's ability to attend some meetings or to obtain some records is still compromised by a number of legal ambiguities.

Earlier this year, the Legislature passed a welcome measure broadening the sunshine law. Among its provisions, it requires boards and commissions to allow the public to present written or oral testimony and gives the public the right to sue a board for violating the open meetings' law. Boards are also now required to announce the reason for holding a closed meeting.

The law, however, doesn't go far enough. Still unclear, for instance, is whether ad hoc temporary committees are open to the public. State agencies' meetings with attorneys are another gray area. And there is widespread confusion over what type of meeting falls under sunshine's provisions.

An equally large deficiency concerns public records. At present, virtually any government document containing the name of an individual can be kept secret.

While privacy considerations are important and often necessary, the law is ambiguous as to which documents are considered public. The need to restore balance between the state's privacy and sunshine laws is an issue that demands attention by legislators next year.

In part, the shortcomings of the sunshine law stem from a failure by the public and the government to understand its intent.

Here, the state has a responsibility to educate government employees. Unfortunately, all too often the Ariyoshi administration has seemed to take the position that meetings should be closed unless required to be open.

Private organizations, too, from the Sunshine Coalition to Common Cause and various media groups, can aid that process and help educate the public.

The Democratic process requires that government be open and accountable.

Ensuring openness in government requires both constant vigilance and the passing of airtight measures that clearly spell out the law's intent. For all proponents of the sunshine law, that's the challenge of the next 10 years.
State Says Questions About Child Facilities Are More Numerous

WED MAY 8 1985 SB H
By Helen Altonn
Star-Bulletin Writer

The state welfare agency has had an increase in inquiries about child day-care facilities since the 1984 Legislature opened the licensing records for public scrutiny.

But most people call the Department of Social Services and Housing for information instead of going there to examine the records.

Since records were opened for public inspection last year, the DSSH has had 177 calls asking about child-care centers or licenses, said Jane Okubo, assistant program administrator for day-care licensing.

She said there has been more public awareness "that this service is available to them" since media and legislative attention to child-care problems last year.

The law was changed to open the records after three children were abducted from a Windward preschool.

However, Okubo said there have been only 21 requests to read records on child-care facilities. At least four were from the media. Some were from attorneys or investigators. About 19 requests to read the records were from child care operators and parents, Okubo said.

One request was from a day-care center with seven facilities that wanted to see its own records, she said.

THE DSSH staff spent months last year "sanitizing" the records to put confidential information in separate reports.

The big job now is to work out procedures for criminal history background checks for employees of licensed child-care facilities, Okubo said.

She said the DSSH is working with the Hawaii Criminal Justice Data Center, which was given $30,000 in next year's budget to hire two people to process the record requests.

"We're looking at experiences of other states to see what they've done and how effective their procedures have been," Okubo said.

She said there are now 410 licensed day-care centers and family child-care homes on Oahu, 75 on the Big Island, 55 on Maui, and 49 on Kauai.
Hawaii’s Closed Door Policy

By William Cox

ONE OF THE ARGUMENTS most often raised in defense of conducting government business behind closed doors is that it is more efficient than operating in full view of the public.

That argument, rarely mentioned by taxpayers or voters, is a favorite one for public officials who resent being held accountable for their actions.

However, we may be hearing that argument much less frequently. Look for some new converts to open government.

The reason?

A bill to give big raises, at least 34 percent, to state officials from the governor on down failed in the Legislature. House members would not approve the pay raises, saying they were not adequately informed about the details because they were worked out in secret by the legislative leadership.

The governor didn’t get his raise. Neither did the judiciary. Neither did the state department heads.

What’s more, Hawaii is in the awkward position of having hired a new president for its state university, promising him a pay package it now can’t deliver.

So, we may not be hearing much about how efficient it is to operate government in secret.

HAD THE SALARY PLAN been discussed in public — there were no hearings on the bill that got to the House floor — a number of legislators might have changed their minds and voted for the bill.

Reviewing the salary mess may change the minds of some legislators who were not sympathetic to open government laws proposed during this session.

A watered down measure on government meetings passed both houses, but with a number of significant loopholes.

A bill to require more public access to records of how state government operates passed the Senate unanimously.

It never got out of committee in the House.

The same House that refused to pass the pay bill because the details had been worked out in secret, leaving the members little time to digest the numbers when they finally were told.

House members — and the state officials who lost their raises — got a good lesson in the problems caused by closed government.

It is a lesson some public officials never learn, or don’t want to accept.

That’s why we need laws to make sure the people’s business is conducted in the open. Openness is the best check we have to make sure that government is honest, responsive, competent.

Oh yes, and efficient.
Privacy Bill Put on Hold for a Year

FRI MAR 22 1985 SS H

Changing the state PRIVACY code to give the public easier access to government records will have to wait until next year, Rep. Dwight Yoshimura said yesterday.

The chairman of the House Public Employment and Government Operations Committee said his panel will be able "to take a little closer look" at the bill in the second year of the biennial legislative session.

The committee should move "with caution" before making extensive changes in the privacy code, Yoshimura said.

He never did schedule a public hearing on the bill providing easier access to government information, which is supported by news and civic organizations.

"We would have liked to see something come out of this issue," said Jon Lind, executive director of Common Cause/Hawaii. "It is a complex issue — balancing privacy and openness."

If holding the bill another year results in "a workable and solid statute, that may be worth it," Lind said.

"WE REALIZE it is a complex issue, and even we aren't completely clear on the implications of the issue," he said.

Lind said he hopes Yoshimura will work with various supporters of the bill to get it passed next year.

Representatives of the news media and community groups have called for amendments to the 1980 privacy code. They have said the law is so broad that it allows government attorneys to unfairly restrict the release of records to the public.

Because of the privacy law, government officials have refused to release information on motor vehicle registrations, public employee salaries and other records.

The measure, proposed by Common Cause/Hawaii, would have prohibited the release of records that would be "a clearly unwarranted invasion of personal privacy." This restrictive standard would have compelled officials to release more government documents to the public.

THE BILL's supporters have said the privacy law is vague and doesn't give any guidance to government attorneys when they determine what records should be withheld because of the privacy provision.

An individual's medical, psychiatric, welfare, employment, income tax, financial and other records would not be released by government officials under the bill. Also, criminal investigation reports would be exempt from disclosure.

But a public employee's title and pay would be public information.

The bill also would permit the release of private information "if the public interest in disclosure clearly outweighs the privacy interests of the individual."
Responsible Company unable to Use DOT Registration Files

By Sterling Morita
Star-Bulletin Writer

If you drive a used 1982 Honda Accord or a 1978 El Camino, you might never find out that there could be something wrong with it.

The same goes for motorists who have purchased other second-hand cars in Hawaii where there have been 483 recalls of defective motor vehicles since 1982.

This is because the company "as is supposed to notify car owners of defects is unable to obtain car registration information from the state Department of Transportation. Hawaii is the only state to refuse to release such records.

Car manufacturers are able to notify original owners of vehicles, but can't track down those who have bought them second.

"There's a break in communications," G.A. Morris, legislative lobbyist for R.L. Polk & Co., which is hired to make recalls, stated. "The average citizen might be driving around not knowing there is something wrong with her car.

This is because of the state privacy law, which government attorneys say forbids the release of motor vehicle registration records because they contain personal information.

MORRIS HAS joined representatives of the news media and civic groups to support an amendment to the privacy law to provide greater public access to government records. The Senate has approved the bill, which is now in the House Public Employment and Government Operations Committee.

In January, Polk, which is contracted by car manufacturers to notify owners of recalls, asked transportation officials for information about owners of 1982 Accords and other cars in the alternator harnesses could be replaced.

"The company also sought the same information so the rear axles of 1979, 1979, and 1980 El Caminos, Cutlassens and Metallic could be checked.

"General Motors has further agreed to inspect those axles in need of repair, as the federal government has ruled that there is a danger of separation and, therefore, a severe safety hazard," according to a Polk letter to transportation officials.

Although it is difficult to estimate the number of used vehicles that need to be recalled, Polk has said 47,515 vehicles in Hawaii were recalled in 1982 and 1983. In the first 11 months of 1984, there are more than 600,000 motor vehicles in Hawaii.

Transportation officials haven't responded to those two and other requests for car owner information, Morris said. However, they said rules are being prepared and Polk should soon have access to those records of vehicles recalled.

"About 75 percent of the recalls are safety related," Morris said.

POLK'S STAFF is working with a 1981 state vehicle registration list that is outdated because cars are sold or owned out of state, Morris said.

State Transportation Director Wayne Yamashita said his department is preparing rules to allow the release of the information to Polk if it posts a $180,000 bond. Morris said the company would not object to a $25,000 or $50,000 bond, but the department's figure is too high.

As for the past three years, no formal requests for recall information have been forwarded to the Transportation Department. Yamashita said but Morris said Polk has used numerous times to work out a system through legislation and rules for the release of the records.

Acting Attorney General Michael Lilly has told senators that he doesn't see why motor vehicle registration records should be confidential.

But as long as the privacy code continues to be vague and contains penalties for improper disclosure, government employees will be reluctant to release records with identifying information about individuals, Lilly said.

An advisory committee for the Illinois secretary of state Oxford 1983 that motor vehicle registration records are "innocuous" and their release doesn't violate an individual's right to privacy.

THOSE RECORDS are considered to be private because they are tied into the statewide traffic system, which includes traffic violations and parking tickets.

But Yamashita noted that in the past when the information was available, there have been complaints "that some guy would see a good-looking chick in a car and call up to find out who she is."

Also, some people are concerned that the information on the "motor vehicle registration lists will be used for mass mailings," Yamashita said.

"They could get the people with expensive cars and try to market certain kinds of products to you," Yamashita said.

Morris said Polk wants to use the information only for recalls and has agreed not to use the information for mailing lists or other purposes.

The law governing the release of motor vehicle registration records has undergone at least three changes in recent years, Morris said.

When access to the records were closed, town companies had to get lawmakers to change the law because they were unable to notify car owners that their vehicles had been towed away.
Privacy Law
Prevents Auto Safety Recalls
Responsible Company Unable to Use DOT Registration Files

By Shirley Morris
Star-Bulletin Writer

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""
Hope for sunshine?

Bills for more open government have been given a struggling second chance this year thanks to the state Senate which passed two measures calling for increased public access to official records and meetings.

Now the issue is up to the House where there has been less enthusiasm and the outlook for action is uncertain at best.

These measures are in response to a clear need to restore the balance between the state's sunshine and privacy laws and the principles they represent.

All too often in recent years, government officials and bureaucrats have used the privacy law to close records and meetings that should be open to the public. Cases in point involve child abuse, milk hearings, pesticides in our water supply, sewer records, government contracts, and tax revenue estimates.

In some of those cases it took costly and time-consuming legal action by the media or others representing the public interest to release information or open meetings that officials wanted to keep private.

The two bills from the Senate judiciary committee, which were approved by the full Senate unanimously, are sensitive to the need for privacy when warranted and also the problem of it being used as an excuse for government secrecy.

The measures are now before the House Public Employment and Government Operations Committee. It will be a tight squeeze getting passage at this point, but the problem of excessive government secrecy carried out in the name of privacy is not one that should have to wait another year.
Privacy Law Changes
Win Senate Approval

By Robbie Dingeman
Star-Bulletin Writer

The head of the citizens' group Common Cause/Hawaii said yesterday an organization is "real pleased" that two measures calling for increased public access to government records and meetings have won Senate support.

One Senate bill attempts to provide more public access to government records while at the same time preserving each citizen's right to privacy. The second measure is designed to give the public a chance to participate in more governmental meetings.

The state Senate yesterday unanimously approved the proposals in a floor vote and sent them to the House for consideration.

Ian Lind, executive director of Common Cause/Hawaii, helped draft the open records proposal. If the measure earns full legislative approval in its present form, it will be "a useful advance over the current statute," Lind said. However, he believes the proposal can be improved. He plans to urge House lawmakers to further clarify the distinction the privacy measure makes between personal and public records.

"THE PROPOSED changes in the state's privacy law would permit the release of government records if the public interest in them clearly outweighs the privacy rights of individuals. Representatives of the news media joined with civic groups in supporting the measure. Proponents say the current privacy law is too broad and vague and keeps information from the public."

Although the current privacy law was designed to protect the individual, backers of the new law argue that it can be used to keep taxpayers from knowing what their government is doing. Under the proposed changes to the privacy law, the following records would remain private: Medical, psychiatric, income tax, employment, welfare, financial and criminal investigation.

THE SECOND Senate measure attempts to strengthen the state's sunshine law by specifying what types of government meetings can take place behind closed doors.

"The proposed changes to the state's sunshine law would:
✓ Require a governmental board to give "reasonable opportunity" to allow the public to testify.
✓ Require the approval of the majority of a board to close a meeting. All members who voted to close such a hearing also would have to publicly announce and record their reason for doing so.
✓ Forbid a public official to require those who want to inspect records to state their reason."
Senate Measure Eases Access to Public Data

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By Robbie Dingeman and Gregg K. Kakesako
Star-Bulletin Writers

The state Senate is set to act Monday on changes to the state privacy law that would give the public greater access to government records.

But a measure calling for a statewide initiative allowing voters to enact laws through the petition process is dead for this legislative session.

The privacy act amendments, supported by local news media and citizens' groups, won approval last night as Senate committees worked against midnight deadline for sending bills to the Senate floor.

Proposed by Common Cause, Hawaii, the bill would allow the release of government records if the public interest in them clearly outweighed privacy interests of individuals.

The measure would prohibit the release of records that would be "a clearly unwarranted invasion of personal privacy." Individual medical, psychiatric, welfare, employment, income tax, financial and criminal investigation records would be exempt from disclosure.

But a state employee's pay would be public information.

OTHER measures making the Senate's midnight deadline would:

--Require immunization for admittance to island public schools.
--Appropriate $2.75 million for sugar research as long as the industry puts up a matching amount.
--Require drivers and front-seat passengers to buckle up or face a $25 fine each.
--Appropriate $5 million for construction of a general aviation airport at Dillingham airfield at Mokuaikaua.
--Increase from 30 days to 90 days the suspension of a driver's license for first-time conviction for drunken driving.

SENATE Judiciary Chairman Anthony Chang early this morning said he was willing to approve his version of an initiative proposal but ended up holding on to it because of opposition of Sen. Mary Jane McMurdo.

McMurdo, who does not sit on the Judiciary Committee, said Chang's bill was far too restrictive.

She criticized Chang's measure because it would bar the use of initiative for matters concerning planning and zoning, judiciary, collective bargaining and finances.

"If you really believe in democracy, there's no way you can support it," McMurdo said. "Better no bill than a bad bill."

She and other initiative proponents said Chang's bill would hinder citizen participation in government rather than encourage it.

The state's four counties already have enacted ordinances allowing local initiatives.

The House Judiciary Committee shelved three versions of initiative after holding a hearing on the matter, but supporters had hoped that body would reconsider if the Senate approved a bill.
In government

Restoring openness

One usually thinks of places where citizens can’t find out what their governments are doing as having dictatorial regimes — or just corrupt ones. But in a democracy, an informed citizenry is the starting point for good government.

Ten years ago Hawaii became a national leader in ensuring state government would be open and enlightened. Our “sunshine law” guaranteed access to meetings and records for the public and, of course, for the news media which are often surrogates for busy citizens who want to know about their government but cannot observe and enquire in person.

Unfortunately, that progressive spirit has been eroded. As Jeffrey Portnoy, First Amendment attorney for The Advertiser and other media organizations, told the Senate Judiciary Committee this week:

“Despite the fact that this Legislature has clearly stated the public policy of this state is to conduct the operations of government in public and the public’s right to know is secure, there is an increasingly disturbing trend which has evolved in our state toward a presumption of closed government.”

In 1980 the Legislature passed a privacy law (mandated by 1978 constitutional amendments) defining the personal information not to be released by government so broadly that there was no balance between the worthwhile goal of individual privacy and the people’s right to know about public affairs.

As William Cox, managing editor of the Honolulu Star-Bulletin, speaking on behalf of the Freedom of Information Committee of the Hawaii Professional Chapter of the Society of Professional Journalists, said of the privacy law:

“It is a law that was written to try to protect the privacy of individuals. Instead, it is being used to protect government from citizens — from accountability, from detecting poor performance, from detecting waste.

The guiding principle, as we have noted before, ought to be to see how much government business can be open to the public. Instead, too often state (and at times city) officials and bureaucrats have gone the other way — seeking to see how much can legally be kept closed and secret.

As a result concerned organizations (usually in the media) have had to force the issue of openness at considerable private expense through legal channels in some of the most controversial issues to face government here — from decontrol of imported milk to child abuse records, from water use advice to tax revenue estimates, from sewer records to ambulance response times.

The Legislature has the opportunity to amend Hawaii law to help ensure that the processes of government will be open except where access to information “would clearly be an unwarranted invasion of an individual’s privacy.”

It should do so. And once a more reasonable standard of balancing privacy and sunshine is in place, government officials need to renew their commitment to Hawaii’s tradition of optimally open government.
Sunshine Law: It needs some shoring up, witnesses tell Senate panel

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By Jerry Burriss

A decade after it was first passed, Hawaii's Sunshine Law on open meetings and records has begun to fall apart, a parade of witnesses told the state Senate Judiciary Committee yesterday.

Bureaucratic interpretation and the restraints of a 1980 "privacy" law have left Hawaii with a "national reputation for coming down on the side of privacy" rather than public disclosure, now-retired attorney Jeffrey Portnoy told the committee.

The occasion was a hearing on a variety of bills aimed at "strengthening," "clarifying" or rewriting the state's basic law concerning citizen access to government files and public meetings.

Committee Chairman Tony Chang said after the hearing that his committee will attempt to draft a compromise package of sunshine legislation that can be considered by the Legislature this session.

But Chang noted it will be difficult to write legislation that adequately covers such complex and conflicting topics as privacy, attorney-client privilege, public access and citizen right-to-know.

The chairman said he'd hold a decision-making session of the committee today if a draft bill can be finished in time.

Portnoy said that when the Legislature first enacted its Sunshine Law 10 years ago, "it was hailed by many as one of the most progressive open-government statutes in the United States."

Unfortunately, this spirit of open government has proven to be difficult to maintain, and our experiences of the past several years have demonstrated an increasing philosophy toward more secrecy in government and governmental decision-making," said Portnoy, a First Amendment attorney for The Honolulu Advertiser, KHON-TV, KITV-TV and other media.

A major problem, witnesses told the committee, was the enactment in 1980 of a privacy law directed by the 1978 Constitutional Convention.

Government lawyers and administrators, fearful of criminal penalties for violation of individual privacy, have invoked the privacy act as a reason for governmental secrecy.

"Evidence indicates that (the privacy law) has created a situation in which government agencies are required to treat a wide range of records dealing with activities and performance of government as confidential, although in many cases there is a legitimate public interest in their disclosure," said Common Cause/Hawaii Executive Director David Lind.

Honolulu Star-Bulletin Managing Editor William Cox said reporters for his newspaper have frequently run up against the privacy law while gathering news.

"It is a law, as many of you know, that was written to protect privacy of individuals," Cox said. "Instead, it is being used to protect government from citizens."

The issue that drew disagreement even among supporters of greater "sunshine" is whether the law should be generally broadened or whether it should contain specific lists of public and confidential information.

A key change, Portnoy said, would be to include the right of citizens and news media organizations to recover legal costs when they have to go to court to obtain public information.

His clients, he said, have spent "tens of thousands" of dollars in just a few specific courts cases over information access. Such costs, he said, tend to discourage attempts to obtain information.

There was no strong opposition to change in the overall sunshine or open-meeting law, although the state attorney general did object to specific sections applying to the legal work of the attorney general's office. For instance, the office said it wants the right to withhold information gathered in preparation for a legal case even if such information might otherwise be publicly available.

"Any amendment that would erode the protection accorded to the work products of government attorneys would destroy the privacy of case preparation, which is essential to any attorney and would severely handicap the state's attorneys in representing the state," said testimony submitted by the attorney general's office.

The Honolulu Police Department had similar reservations concerning release of information dealing with investigations of crimes.
Groups Support Attempts to Free More Information

By Stirling Morato
Star-Bulletin Writer

Ten years ago, state lawmakers were praised for their commitment to open up the government process to the public by passing the sunshine law.

Now, representatives of the newspaper and community groups are back at the State Capitol supporting moves to make more government information available to the public.

What happened since 1975? Legislators enacted a privacy code in 1980 that restricts the release of government documents.

After a Senate Judiciary Committee hearing yesterday, Chairman Anthony Chang said he favors a change in the privacy law. But he said he doesn't know if the committee will have time to draft a compromise measure by Friday's bill deadline.

If the Judiciary Committee isn't able to accommodate concerns expressed by state administrators and civic groups, then there won't be any amendments to the privacy law this year.

The privacy bill would allow release of government records unless it would be a clearly unwarranted invasion of a person's privacy. It would provide a balancing test between the public's right to such information and privacy.

Under the bill vague definitions of what records can be withheld from the public would be replaced with more specific language.

State health and welfare officials made suggestions for changes to the measure, noting that they didn't want personal information in their files available to the public.

Representatives of the news media and civic groups cited example after example of records that have been closed from public view because of the privacy law.

Jan Lind, executive director of Common Cause/Hawaii, said the 1978 constitutional amendment leading to the privacy code was intended to protect highly personal information such as records on personal finances, abortions and job evaluations.

But because the Legislature enacted an incomplete version of the Uniform Law Commissioner's model privacy act, Hawaii's law is vague and allows government attorneys to keep records from the public, Lind said.

William Cox, managing editor of the Honolulu Star-Bulletin and a representative of the Honolulu Chapter of the Society of Professional Journalists (Sigma Delta Chi) also supported the bill.

The measure "provides for protecting the privacy of individual on such personal information as health and financial records while allowing public access -- taxpayers' access -- to records that are relevant to determining how government works," Cox said.
Vote Pending on Privacy Code

The state Senate Judiciary Committee will act tomorrow on a compromise bill to amend the privacy code and allow the release of more government records.

Chairman Anthony Chang said time is running out to approve the bill, adding it may be a tough job to accommodate both the concerns of the administration and the bill's supporters.

The compromise measure was prepared by Common Cause/Hawaii, a citizens' lobbying organization.

Ilan Lind, Common Cause's executive director, prepared the draft that combines a freedom of information procedure with restrictions on what government records can be withheld because of privacy considerations.

The bill as it is now drafted would require government officials to respond to requests for records within 10 working days. It also specifies the types of records that are private and can be withheld under the privacy law.

News media organizations and civic groups yesterday told the committee that the current privacy act is so vague that it allows government officials to withhold records that should be available to the public.

However, state administrators urged the committee to be cautious in changing the law, saying health and welfare records of individuals shouldn't be released.
Freedom of Information Versus Right of Privacy

Freedom of information and the right of privacy are both cherished values of our democratic society. Sometimes they conflict with each other. Sometimes the right of privacy, which has to do with protecting individuals, is misused by government to justify withholding information from the public.

The Star-Bulletin supports the right of privacy as it pertains to the protection of individuals; we oppose government's use of it as a reason for more secrecy.

A bill now before the state Senate would improve the privacy law by allowing public access to government records that are relevant to learning how government works. At the same time it would protect individual privacy with regard to such personal information as health and financial records. To deal with instances of conflict between the public interest in disclosure and the right of privacy, it would establish a balancing test.

Two other bills before the Legislature would respectively expand and contract the kinds of meetings that can be held in secret. One would exempt county councils from the open meetings law. That should be defeated.

The other would narrow the law's exemptions, particularly those involving discussions between lawyers for an agency or board and its members. This proposal would permit necessary private meetings without tolerating misuse of the lawyer/client exemption.
Changes Needed in Privacy Law, Senators

By Stirling Morita
Star-Bulletin Writer

The people who are supposed to notify Hawai'i residents that their cars are being recalled to correct defects can't.

That's because the company that does the notifying isn't allowed to see motor vehicle registration records here. Government officials are worried about someone's privacy being invaded.

Today, state Senate lawmakers weighing proposed amendments to the state's privacy law heard about the recent situation and many others in which government withholds information from the public.

Representatives of news media and civic groups testifying to the Senate Judiciary Committee said changes in the privacy law are needed.

News media attorney Jeffrey Portnoy said that since the privacy law was enacted in 1993, he has battled government officials over release of salaries of university professors and records governing c.ilk inspection, preschools, the Board of Education, water, health and budgets.

The bill under consideration would provide a balancing test between the public's right to know what its government is doing versus an individual's right to privacy.

Supporters of the measure said the current law is too broad and vague, and permits the attorney general to interpret it too conservatively, keeping information away from the public.

The current privacy law "is ambiguous enough to encourage a great deal more secrecy about how government works -- or doesn't work -- than in any state I am familiar with," said Star-Bulletin Managing Editor William Cox.

"It is a law, as many of you know, that was written to try to protect privacy of individuals," Cox said. "Instead, it is being used to protect government from citizens -- from accountability, from detecting poor performance, from detecting waste in spending."

Lin Lind, director of Common Cause/Hawaii, said Hawaii Kai residents can't find out whether ambulance service there is adequate because records about ambulance runs are now considered private because they include the names of the people who sought help.

The proposed amendments list a number of specific instances where information could be released to the public, such as public employee salaries.

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Told

State health and welfare officials urged the committee to be cautious in making changes to the privacy law.

Robbie Alm, deputy director of the Department of Commerce and Consumer Affairs, said legislators might want to take a comprehensive review of the state open meetings and records law, as well as the privacy law.

This year is the 10th anniversary of the passage of Hawaii's first comprehensive open meetings and records law.
Hearing Will Consider Changes in Privacy Code, Sunshine Law

Whether the public will be able to find out more information about the state and county governments will be the subject of a Senate Judiciary Committee hearing at 8:30 a.m. tomorrow.

The committee will hear testimony on seven bills, which propose changes to the state's privacy code and the open meetings law, also known as the Sunshine Law.

The hearing in Senate Conference Room 4 will be on the following measures:

- A bill by Sen. Neil Abercrombie to make government information stored on computers available to the public.
- Another Abercrombie measure that would set up procedures for agencies to follow in releasing records or denying requests to see documents. Under this bill, an agency would have 10 working days to respond to a request to see government records.
- An Abercrombie bill that would tighten restrictions on government boards and commissions under the Sunshine Law.
- An Abercrombie measure that would allow the release of certain types of information, such as government employees' salaries.
- A bill by Sen. Mary George to exempt county councils from the restrictions of the open meetings law.
- A bill by Sen. Anthony Chang that would allow release of personal information for research purposes and restrict the kinds of records that could be withheld based on privacy concerns.
- Another Chang bill that...
State Privacy Law
Is Too Restrictive

Hawaii's so-called privacy law and some bargaining agreements need rewriting to prevent government officials from using them to keep taxpayers in the dark.

Last week, the Legislature saw two examples of how the state administration uses the law.

When a legislative committee tried to ask questions about serious problems at the Kulani prison camp, a corrections department official said the findings of an investigation are off limits to the Legislature. The reason? To protect the privacy of the prison guards and officials who were investigated.

That's an interesting interpretation: A guard's right of privacy about how he performed in a job paid by state funds outweighs the rights of the public, through its elected legislature, to learn whether problems were solved and the culpable were punished.

Later in the week, the Legislature saw a very different interpretation of the law from the same state administration. The Oahu supervisor of the state Department of Agriculture's pesticides branch, Hector Matsuda, testified he was told to "lay off" and "forget it" when he found dangerous chemicals were being misused by farmers.

Apparently, he waived his right to privacy when he criticized his superiors. His boss, Jack Suwa, summarily revealed the essence of Matsuda's personnel file: he had been passed over for a promotion, "isn't a good supervisor," and can't communicate with his fellow workers, all according to Suwa.

What, then, is a private fact? If a fact tends to embarrass the state administration is it off limits? If it embarrasses a critic, then is it no longer private?

We need a new law with a clear and narrow definition of what few -- very few -- government records should be kept private, such as medical records.

Most of all, we need to face this fact: Hawaii's state government is one of the most secretive in the nation, even when the health of its citizens is at stake.

When a research team for the federal Environmental Protection Agency sought to learn when Hawaii residents were first exposed to heptachlor, the state attorney general blocked their access to the people and records who could answer that question.

All of us are paying a price for secrecy in state government.
Privacy reform needed

It was with much sympathy that we observed the House Corrections Committee's difficulty in getting information from the state administration on conditions leading up to the shakedown and staff reorganization last year at the Big Island's Kulani Correctional Facility.

It's a situation that borders on the absurd: A confidentiality section written into a collective bargaining agreement bars legislators from getting information needed in making important decisions on this facility and its budget.

With all respect for rights of privacy, etc., a better balance is needed in terms of the public's — and the Legislature's — right to information.

Maybe this particular sort of problem can be handled in new agreements now being negotiated. But it is also part of the larger problem we and others have with the state administration and the 1980 state privacy law.

The media have been fighting with the state government in the past few years on excessive secrecy in matters that include sewer records, government contracts, milk hearings, pesticide in our water supply, and daycare center records.

As we have said before, part of the problem is an attitude against openness in the state administration where the law is too often read to mean that records should be closed until forced open by legal action or public pressure.

Still, the privacy law also needs looking at to draw a better balance between the right of privacy and the need for more public access to government information.

So it is hoped the frustration of the House committee will help stimulate action on some of the proposals in the Legislature to reform the privacy law.
Three Good Proposals
Before the Legislature

Three bills introduced in the current session of the Legislature deal with problems that should be familiar to readers of the Star-Bulletin: pesticide contamination, freedom of information and regulation of insurance companies. These subjects have been discussed extensively in this newspaper.

For the third time, Sen. Ben Cayetano has introduced a bill that would transfer the Department of Agriculture's powers to monitor and enforce laws regarding the use of pesticides to the Department of Health. Cayetano points out that the Agriculture Department's main function is to promote agriculture, which may conflict with enforcement of pesticide restrictions. The Star-Bulletin disclosed that state officials covered up pesticide contamination on Oahu for years.

Rep. Donna Ikeda has sponsored a bill that would revise the state privacy law by adding a freedom of information section. The Revised law would follow the model privacy law adopted by several states. It is endorsed by the Honolulu Media Council, Common Cause and the Hawaii chapter of the Society of Professional Journalists, Sigma Delta Chi. Attention was focused on the shortcomings of the current law when this newspaper, reporting on an abduction/rape case, discovered that information on preschools regulated by the state was being withheld from the public.

Rep. Mitsuo Shito has introduced a bill that would empower the state insurance commissioner to take control of a financially troubled insurance company immediately, without going to court. Following the collapse last September of a major auto insurance company, the Star-Bulletin described the deficiencies of the present law.

All three bills represent informed responses to real problems. They have our support.
Privacy Law Amendment Proposed

By Stirling Morita
Star-Bulletin Writer

The state privacy law has been used to hide government information from the public and should be changed, Republican Rep. Donna Ikeda said yesterday.

She sponsored a bill that would balance the privacy code with a freedom of information section.

"With the privacy law, it's left up to the interpretation of the attorney general who, depending how he feels about it, will usually keep the information confidential," Ikeda said.

Her bill would allow the release of private information if there was a benefit to the public interest. "It's a lot better than what we have now," Ikeda said.

"We now have a way of styming information to the public."

When the privacy law was enacted six years ago, lawmakers only had a draft of model legislation prepared by the Uniform Law Commissioners, Ikeda said. Hawaii's law was crafted from the "bad parts of the draft," she said.

SINCE THEN, the Uniform Law Commissioners have come up with a refined version of the law and changed objectionable sections. Ikeda said her bill is the final version of the commissioners' work.

Howard Graves, president of the Hawaii chapter of the Society of Professional Journalists, Sigma Delta Chi, said: "The public is to become educated and involved in Hawaii's government, then it must have this legislation.

"The present law encourages secrecy, rather than eliminating it. The current law is calculated not to inform the public, but to conceal from the public."

Graves said the bill is "a step toward wiping out what has become an intolerable situation."

OTHER BILLS introduced in the Legislature would:

✓ Increase the tax credit for low-income renters from $50 to $75 per exemption.
✓ Allow pari-mutuel wagering on greyhound races.
✓ Limit the liability of the state and county governments to $50,000 in civil cases.
✓ Set a mandatory five-year prison term for drunken drivers convicted of negligent homicide.
Common Cause calls for changes in privacy law

By Sandra S. Oshiro
City/State Government Bureau

Hawaii's privacy law is casting a shadow over the state's "sunshine law" that governs open meetings and public records, the head of Common Cause Hawaii said yesterday.

In several recent incidents, state and city officials have cited the privacy act in withholding public records from reporters and the public. Ian LInd, told a Honolulu Community Media Council meeting.

Complaints about preschools, ambulance response times and state contracts have all been closed to the public. Lind said. Without adequate information about how government works, the public will find it impossible to hold officials accountable for their actions, he said.

Lind said the result was a "state law, interpreted broadly by government, attorneys that has taken a "big chunk" out of the public's ability to view public records.

Common Cause is lobbying for changes to the state law more in line with the model legislation.

One amendment would require officials to view the public records in the context of a broad policy of increasing the public's right to know about government activities. LInd said.

Another media council speaker expressed skepticism that the amendments to the law would significantly change official attitudes.

H. Baird Norris, former Hawaii Supreme Court justice, said he endorsed the Common Cause proposal. "It is a matter of philosophy," but he said government agencies would still get to decide if information could be released based on their view of what is in the public interest.

Jeffrey Portnoy, a Honolulu attorney who has represented news media clients, expressed a similar thought in calling for changes to the state "sunshine law." Without naming Gov. George Ariyoshi and Attorney General Michael Lilly specifically, Portnoy said he was convinced that if the attitude of the governor and attorney general would change, there wouldn't be any need to amend the law.

Portnoy said in the past four years of the state administration -- and in some parts of the city government -- the attitude has been that "everything is closed unless we're forced to open it."

Portnoy said, however, that Lilly has made a move to speed the processing of requests for information. He plans to name a single deputy attorney general who will handle questions about open records. Until now, that duty has been handled by numerous deputies representing departments from which the information was sought.

 Norris suggested that one government agency be designated to handle the requests for information. It could develop guidelines on what could be released and balance the interests of the public and government agencies.

Portnoy warned that lobbying for changes to the "sunshine law" could result in a backlash. Some legislators feel the statute is already too liberal, he said.

But Portnoy said the time is right to lobby heavily for changes to the law that will not leave too much for state attorneys to interpret.

He called for a repeal of a modification of the law's restrictive provision on personnel records. Portnoy said the provision has been used to withhold information about public officials who are receiving public money.

Those who are successful in suing for access to information should also be allowed to seek reimbursement for legal costs under an amended law, he said.
New Look at Wiretap Law Set

Two Cases to Be Argued Before Hawaii Supreme Court

By Lee Cameron
Star-Bulletin Writer

The state Supreme Court will take a new look next month at Hawaii's wiretap law that prosecutors criticize as being too restrictive and defense attorneys call an unfair tool of the judiciary.

The justices will hear arguments in two significant cases involving the law on April 19. The first involves tapes recorded by a Honolulu police officer that were made by order of a judge, who later charged the police with illegally wiretapping phones.

In a 1989 decision, the high court in 1989 upheld the state's wiretapping law, which allows police to install wiretaps and record conversations in which a suspect is present, a police officer, a participant, a police agent, or a person who is that person.

Prosecutors maintain that suspects in criminal cases should have no rights to privacy in their conversations.

Since people may testify, and in some cases are forced to testify in court, the evidence they provide for the prosecution is often crucial. In other words, the argument goes, the information gathered from these conversations is crucial to the state's case.

"If you were an innocent person," said Deputy City Prosecutor Thomas Pica, "you would want the tape recorded in court.

Defense attorneys contend that conversations intended to be private should remain private.

"If the court makes any kind of tape recording by police of private conversations, the state will come up," said Hawaii Civil Liberties Union's Richard Oki, who was a university professor when the law was passed in 1979.

In December, the Supreme Court unanimously upheld the judge's decision to disallow tapes of private conversations made in the case of Dr. Michael Lee, a foot doctor charged with illegally dispensing drugs.

The court ruled that tapes of conversations made in the case could not be used because an undercover police officer was not wearing a tape recorder.

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Progress on Making Preschool Files Public

The state House of Representatives has taken an important step toward opening up state child-care records to public scrutiny. By an overwhelming vote of 47 to 1, the House approved legislation making public complaints and inspection reports involving preschools, day-care centers and babysitters.

The action came on a bill initiated by the Ariyoshi administration that had been substantially altered by two House committees. The bill requires that the state Department of Social Services and Housing open records collected in the past four years and this year and then maintain a public file for future reports after deleting names and other identifying information about individuals. Complaints about child-care facilities would be open after 10 working days.

The state administration's version would have authorized disclosure of complaints only after they had been investigated. The state also proposed to delete only the names of complainants from the records, and then only upon request.

As it cleared the House, the measure strikes a reasonable balance between the right of privacy and the clear need to make information about child-care organizations available to the public, particularly to the parents of small children. The provision for a 10-day waiting period on disclosure of complaints should provide sufficient time to investigate most complaints.

...The fact that these records were closed was reported by the Star-Bulletin in the wake of the abduction-rape case at a Windward Oahu preschool. Our view is that the state had interpreted the privacy law too broadly in keeping these records closed, and that there was a legitimate public interest in this information. In addition to the pending child-care legislation, there may be a need to revise the privacy law.

...It is still uncertain whether the Senate will accept the House amendments or send the bill to a conference committee. Senate President Richard Wong said last week that the Senate favored the administration version of the measure, which would withhold complaints until they had been investigated. That could result in bureaucratic foot-dragging.

In the House debate, Rep. Gene Albano cautioned the news media and others responsible to report the contents of child-care facility inspection reports. The contents have "potentially emotional implications," Albano said, and "there is a risk of sensationalizing by telling half of the story."

There is indeed such a risk inherent in many of the matters we in the media deal with, and we do have a responsibility to avoid sensationalism, which we try to live up to. But there is little chance that personal details of these cases would get into the newspapers, except for the most flagrant violations. Parents concerned about choosing preschools for their children that will provide quality care are much more likely to make use of these records than the media. And their right to do so needs to be written into the law.
Complaints and inspection reports involving child-care facilities would be made public under a Senate bill approved yesterday by the House.

The Star-Bulletin reported last month that Hawaii parents could not learn the nature of complaints made against preschools and day-care centers, or see the results of state inspections of those facilities.

The Ariyoshi administration proposed the bill, that would open the records. Yesterday, State Rep. Gene Albanese cautioned the news media and others to responsibly report the contents of child-care facility inspection reports. The contents have "potentially emotional implications," Albanese said, and "there is a risk of sensationalizing by telling half of the story."

With only Rep. Whitney Anderson dissenting, the House approved the bill 47-1.

Albanese said he believes parents should be able to get information from the Department of Social Services and Housing (DSSH) about the facility to which they sent their children. He said those reviewing the records must realize that many of the complaints may be unsubstantiated or there may be another side to the story.

The bill requires that DSSH officials open records collected in the past four years and this year and then maintain a public file for future reports after deleting names and other identifying information about individuals.

Complaints about child-care facilities would be open after 10 working days, under the measure. Also, the bill would require people who are paid to babysit to be licensed by the state government.
Police Impersonators to Face Stiffer Penalties

Legislature Votes Absentee Ballot System

By Stirling Morita
Star-Bulletin Writer

Bills tightening absentee ballot procedures and cracking down on police impersonators were approved by the state House yesterday.

In agreeing to Senate changes to those measures, House members approved 28 bills and sent them to the governor.

Lawmakers decided to change the procedures for getting an absentee ballot because the Kolekole voter fraud case has led to widespread absentee ballot campaign in a special election reinstating resort zoning for the Nanakuli, Kualoa site.

There were complaints about the use of the absentee ballot.

The law currently allows a registered voter to obtain an absentee ballot without stating a reason.

The bill adopted by the House would permit election officials to issue absentee ballots to voters but only if they meet one of seven conditions.

The vote doesn't have to specify the reason for voting absentee, but has to say that his ballot is covered by one of the seven conditions. Generally, voters who will be absent from the election district, are sick or hospitalized, confined to an institution, or have conflicting religious beliefs would qualify for an absentee ballot.

ANOTHER BILL would increase the penalty for people who impersonate police officers. The crime is now a misdemeanor with a maximum penalty of $1,000 fine and one year in jail. Under the bill, the maximum penalty would be a $5,000 fine and five years in prison.

Rep. Terrance Tam, the bill's sponsor, has said he proposed it because of the number of female motorists who had been stopped by people pretending to be police officers.

A bill permitting the Department of Social Services and Housing to cross-check through computer matches the bank accounts of welfare applicants was defeated in the House and approved with only five dissenting votes.

Noting that he doesn't condone welfare fraud, Rep. David Ihalng said the language of the bill is "overly broad" and could restrict the rights of poor people.

House Minority Leader Fred Rohlfing said he found it "ironic" that the bill doesn't disclose its information to the public, but enact laws that require financial institutions to go into the records of our citizens.

APR. 12, 1984 SB 18 

Rep. Alan Taka said the measure only seeks to verify the assets of people applying for public assistance. The state's privacy law was "never meant to be a shield for criminals to escape detection," Taka said.

OTHER BILLS approved by the House and sent to the governor would:

- Require the legislative auditor to analyze new regulatory bills.
- Make a marriage valid even if one of the partners is impotent or incapable of consummating the marriage.
- Create a permanent low committee for chiropractors to maintain professional standards.
- Update the law governing industrial loan companies and make it dovetail with federal statutes.
- Allow the use of rent trust funds when there is a court dispute between the landlord and tenant over payments.
- Authorize the Public Utilities Commission to grant interim rate increases to utilities if the commission takes longer than nine months to make decisions on rate increase requests.
- Increase the fines for aiding and abetting unlicensed contractors.
- Allow a judge or the Hawaii Paroling Authority to forbid a convict to go into certain geographical areas.

Reforms
More Open Meetings by Police Panel Seen

By Harold Morse
Star-Bulletin Writer

City Council member Welcome Fawcett, who describes herself as a "subcommittee of one" to study procedures used by the Honolulu Police Commission to deal with complaints of police misconduct, sees the commission moving toward more openness.

John Henry Felix, commission chairman, has spoken of having more open meetings and hearings and "I think you will see some movement in that direction," she said yesterday.

Fawcett addressed a luncheon meeting of the Honolulu Community Media Council at the Pacific Club. She discussed her 17 recommendations for changes in commission procedures which she drafted after a February hearing of the Council Community Services Committee.

The police commission has been criticized by citizens groups because it considers the complaints about police misconduct behind closed doors and does not name officers when it upholds complaints against them.

AT ISSUE is the "public's right to know" and the "individual's right to privacy," she said. "The question is, at what point do we intrude on that individual's right to privacy?"

When a citizen files a complaint about police misconduct with the commission, the officer involved can see the full statement of the complainant, but the complainant cannot see the full statement of the officer, she said.

The officer has a week to review the complainant's statement and offer his own statement in writing, she said.

One of her recommendations is to provide a "comparable opportunity for the parties involved to review the statements of the other," she said.

This would help "equalize" initial presentations, she said.

The commission is "leaning toward" not making such statements available to either party, she said.

A PROPOSAL, advocated by Common Cause, a citizens' lobbying group, would distribute summaries of such statements without names to the public as is now done in cases before the state Ethics Commission and the ombudsman, she said.

Other Fawcett recommendations include moving the Police Commission out of the same building that houses the Honolulu Police Department and removing the requirement that a complainant must go to the commission office to have his complaint notarized.

The requirement discourages some citizens from filing complaints, she said.

Fawcett also called for "appropriately severe and consistent disposition of offenses" involving misconduct of officers.

She also advocated appropriate disciplinary measures against officers who are repeat offenders.

The subcommittee report was not a recommendation for a massive re-construction of the Police Commission but rather, an effort to bring more openness within the system, Fawcett said.
3-2 Decision by State Justices

Court Upholds Taping by Police

By Lee Cotterall
Star-Bulletin Writer

A restructuring state Supreme Court yesterday affirmed a 1982 decision allowing police to tape-record private conversations with suspects without first obtaining a warrant from a judge.

In a 3-2 decision, the high court ruled that tapes used by officers in about 40 tape-to-face and telephone conversations could be used as evidence in the bribery trial of Board of Water Supply Superintendent George Y. Yamamoto.

Yamamoto and Okubo are accused of giving $2,000 in cash and four aloha shirts to two police officers in return for being alerted about prostitution raids of Superior Bath Systems, a Waikiki massage parlor.

Defense attorney Gary T. Hayashi maintained before the Supreme Court last month that police should have been required to obtain a warrant before recording conversations with Yamamoto and Okubo.

THE SUPREME Court ruled that a person's constitutional right to privacy is not violated in a conversation where one participant is aware of it being tape-recorded.

During oral arguments in the case, Justice Frank Pugetti questioned whether there is any "difference between tape-recording and testifying as far as a person's constitutional right is concerned?"

Chief Justice Herman Lum wrote yesterday's majority opinion and was joined by Pugetti and Justice Yoshin Hayashi. Justices Edward H. Nakamura and James H. Wakahama dissented.

The ruling affirmed a decision by the Intermediate Court of Appeals, which had overturned Circuit Judge Himean Abe's rejection of the tapes as evidence.

The appeals court asserted that the target of a tape recording has no basis for thinking "that the person spoken to will not disclose what was said."

THE SUPREME Court agreed to review the appellate court's decision "because of the change in the composition" of the high court. Chief Justice Lum wrote in the majority opinion.

In 1982, the high court ruled that tape recordings were properly used in the murder-for-hire conviction of Donald Lester. In that 3-2 ruling, then-Justice Benjamin Menor, siding with the majority, said he would have voted the other way if the tapes had been recorded in a private place.

Menor and Thomas Ogawa have retired from the bench since joining Lum in that opinion. Then-Chief Justice William Richardson, who retired last year, dissented with Nakamura in the Lester ruling.

Depot City Prosecutor Thomas Pien praised yesterday's decision as being in line with rulings by the U.S. Supreme Court and other state high courts.

Pointing out Menor's conditional position on the issue, Pien said, "Until this case, we haven't had a clear majority agreeing with the U.S. Supreme Court on the wiretap-versus-privacy issue."
Opponents Criticize Its Secrecy

Parole Chief Hugo Backs System

By Charles Memming
Star-Bulletin Writer

The process by which someone is paroled from prison is highly structured, but it is a process that the public is not allowed to view. From the time most prisoners begin to serve their sentences, they begin a step-by-step progression that will lead to an eventual release. And while their trip through the justice system—from arrest to imprisonment—is open to public scrutiny, their final parole review and eventual release is secret.

Thomas Hugo, chairman of the Hawaii Paroling Authority, believes the public does not need to know which prisoners are being considered for parole. He also believes the actual parole hearing should remain closed to the public and that the records of those meetings should be sealed.

But Hugo is among those who believe that the prisoner's rights to fairness should be a consideration in the parole process. He points out that victims who request to be notified of a pending parole hearing for an inmate are told through the Victim-Witness Program.

Hugo, who has been on the parole board for almost eight years, realizes that he is in a tough position. "Every time we release the parole board has to be notified," he said.

THAT dilemma was apparent in the recent parole of organgc crime figure Alvin Kaohu. The board was attacked by some for paroleting Kaohu a year after his scheduled minimum release date. Yet, according to the board's standard procedures, Kaohu was a good candidate for early parole.

Hugo said Kaohu's case was handled like any other.

THE PAROLE board has a number of responsibilities, other than considering when to release prisoners. It also sets the minimum terms inmates must serve and conducts investigations for the governor on prisoners being considered for pardons.

The minimum terms must be set within six months after the inmate begins his sentence, Hugo said. The inmate's maximum sentence is set by the courts.

During his first six months in prison, the inmate is analyzed and a report is sent to the parole board. From there, the inmate begins a step-by-step progression, with each step involving more responsibility as his date of release nears.

An inmate can apply for parole every six months, but he is not encouraged to do so unless there has been a change for the better in his prison status.

The board also can release a prisoner before his minimum term, as was done in Kaohu's case.

Hugo said that a majority of prisoners do not apply for parole, but was until they are called before the board and they have served their minimum sentence.

The parole board, made up of Hugo and part-time members Marc Oley and Rayo Chung, holds weekly hearings once a month at the Oahu Community Correctional Center. The board members are appointed to four-year terms by the governor.

There is no public notice of parole hearings.

Turn to Page A-10, Col. 1

States Differ in Handling of Paroles

By Charles Memming
Star-Bulletin Writer

How much should the public be allowed to know about what goes on behind the closed doors of parole hearings? And how much of a right to privacy does an inmate have while making his appeal for freedom?

These are questions that have been tangled with not only in Hawaii, but throughout the country. And each state has had to decide how much is too much.

In Hawaii, almost every aspect of the parole hearing process is secret.

States on the West Coast have each addressed the problem of public access to parole hearings in different ways.

In Hawaii, victims of crime, or families of victims, can ask to be told when the perpetrator of the crime against them is being considered for parole. But, unlike in the parole hearing process in other states, they are not allowed to participate in the decision-making process.

THE PUBLIC is not notified about who is being considered for parole, according to Thomas Hugo, chairman of the parole board. And parole hearings, although quasi-judicial proceedings, are not open to the public. They are limited to the parole hearing board and those who are attending as witnesses.

As a result, the public does not know what considerations lead to the release or further confinement of an inmate. It also does not know who officially supports or opposes the release of certain inmates.

The parole board does publish a list of minimum terms it sets for inmates. But the minimum terms can be changed, as in the case of Alvin Kaohu.

Kaohu's release even came as a surprise to City Prosecutor Charles Marsland. He said he heard rumors that Kaohu was being considered for parole, but he had not been told about the parole hearing board's decision.

"I could have written a letter that they would have ignored," he said.

IN CALIFORNIA, the parole board takes no action on the "current" cases of prison cases on Death Row.

There is no public notice of parole hearings. Those hearings were closed until 1979, he said.

Now they are open to the public and all of the records associat-
Prison Parole Systems Are Varied

Continued from Page One

with the case are open.

Guthrie said there was
no apprehension about opening
the meeting, mainly because of
the trouble of notifying every
one and arranging for news coverage.

"But I have to say that since
the board has been open to the
media, it has served the board
well," Guthrie said. "The public
had no idea how many released
were denied. The public had the
impression that the parole board
was setting everyone out."

In Oregon, the hearings are
generally closed to outsiders, ex-
cept with an unusual twist. The
innocent can bring a person of his
choice into the hearing room. If
he or she wants, it can be a news
reporter, according to Justus LLC,
chairman of the state parole
board. "An enterprising reporter
could stand outside the hearing
room and ask each unaccompa-
nied inmate if he would take the
reporter in with him," Hays said.

QUESTIONING of inmates is
conducted by one of five board
members and the board members
have no idea which inmates will
be coming in at any particular time.

She said. The only records sealed
are letters that might lead to
harm to the persons who submit-
ted them. Hays said.

In Washington state, parole
and disciplinary hearings are closed
to the public and records are
sealed. The Head of the Parole
Authority of the Washington State
Board of Parole Hearings,
monthly board meeting on the
board: politics is open. Hays said.

Washington also does not dis-
close which inmates are being
considered for parole and records
of the parole hearings are sealed.

Last year, the board considered
4,674 applications for parole, but
are only 78, according to the
authority's annual report.

But the statistic of which the
authority is most proud is that
only about 3 percent of these par-
olees in Hawaii eventually have
their parole revoked.

Once on parole, an inmate is
assigned one of seven case offi-
cers with whom they have to
click in with at various times.

When released, the inmate
may meet with the parole officer
once a week. But at the end of
his parole term nears, the meet-
ings may become less frequent.

"I do the record," he said. "I
don't go by gut feelings.

"(family and friends of
innocents also sometimes attempt
to put pressure on board mem-
ers to free an inmate. Hays said.
He gets calls from people sup-
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Laters sent to the board are
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identities of the letter-writers are
not revealed, Pappas said.

Washington is one state, how-
ever, that recently decided to
abolish its parole board. In 1968,
the board will no longer exist and
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Hawaii parole board chairman
Hugo says there are about seven
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same thing that Washington did.

Hugo said any change in the
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And he wants the trend of
abolishing parole boards in favor
of mandatory minimum sentences
could save costly repercussions.

"If we move in that direction,
we'd better be ready to build
more prisons," Hugo said. "Be-
cause we'll need them."

Parole Board Chief
Defends State System

Continued from Page One

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or against the release of inmates
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are not made public, he said.

"THE MEETINGS are recorded
by a court reporter, but the tran-
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made public," Hugo said.

Inmates, usually accompanied
by their attorneys, are questioned
by board members for about 15
minutes. Hugo said. One reason
for the hearings are closed to the
public. Hugo said. "Every prison
feels freer to talk.

"A prisoner "should have every
benefit to present his case," Hugo
said.

"The board conducts all of its
interviews and then deliberates
before ruling on all of the in-
mates being considered for re-
lease.

The hearings usually are "low
key," Hugo said, when the inmates
outlining why they think they
are ready to be released. Hugo
said he usually puts more empha-
sis on prison records of an in-
nate's progress instead on what
the inmates say.

"I do by the record," he said. "I
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Newsmen Urge Change in Police-Media Relations

By Rod Thompson and Shirling Morita

Honolulu Star-Bulletin Writers

WAIMEA, Hawaii — William Cox, managing editor of the Honolulu Star-Bulletin, this morning asked the Big Island Police Commission to make changes in police procedures so the public can judge whether the police department is doing its job.

Cox and Howard Graves, Honolulu bureau chief of the Associated Press, appeared before the commission commenting on a consultant's four-page report aimed at improving relations between the news media and Big Island police.

"The recommendations proposed in the report for the most part simply do not go far enough in making sure that the public has the knowledge it needs to determine whether its police department is doing its job as well as it might," Cox said in prepared remarks.

"Not every police officer likes the fact that the press, when it does its job right, is a check on the power of the police, as well as on other parts of government," Cox said. "It is not a popular role, but it is an essential one."

The report was prepared for the police department and police commission for free by Hi%u2013%u2013%u2013 hilo public relations man Walt Southward and released last month. Southward is a former reporter and prepares the department's annual report and other work for a fee.

BEFORE today's meeting, Police Commission Chairman William Bergin said Southward volunteered to prepare the report when he became aware at the beginning of the year of Bergin's desire to improve relations with the news media.

Cox today said the public, through the news media, should be entitled to the initial complaint or offense report prepared by a police officer at a crime scene. Hawaii County police currently show the news media summaries of offenses that do not include the names of people reporting the crimes and of those arrested.

If a complaint against a police officer is found to be valid, the details of the complaint along with the police officer's name and resulting disciplinary action should be made available to the public, Cox said.

"Both of these essential reports are not made public under the recommendations before the commission," Cox said. "It is our view that Hawaii law permits their release, and, in fact, encourages their release."

Some government agencies have used the state privacy law to keep records from the public, he said. For police to say that basic police information isn't available under the privacy law "is not supported by either the language or the intent of the law," Cox said.

"OUR BELIEF is that the Legislature did not intend for the so-called privacy law to provide a wall behind which public agencies can hide," Cox said.

In prepared remarks, the AP's Graves told the commission: "As the public's surrogate, the news media must report significant reality with honesty and competence. Good journalism is to report day-in and day-out the generality of what people need to know in order to cope with their most compelling problems in a mighty complex society. Neither the news media nor the law enforcement agencies can ignore truth."

CHAIRMAN Bergin also chairs the commission's Media Relations Committee which will study the matter further before making recommendations to the commission. The Southward report will be used as a resource by the police commission, but its recommendations will probably be altered, with additions and deletions, before any of them are adopted by the commission, Bergin said.

The report makes 24 recommendations, some advocating that the police department release more of certain kinds of information, that the news media must show more restraint by not publishing certain information and that no change be made in certain current practices.

Cox said he could support recommendations involving general orders, press passes and internal improvements within the police department.

Difficulties between the Hawaii County police and the Big Island news media go back as early as 1974, when the Legislature passed a law preventing police from releasing the names of people charged with crimes until they were convicted.

The Big Island Press Club unsuccessfully opposed the measure in court, but succeeded in having the law repealed the following year.
Ikeda says ‘privacy act’ needs to have major rewrite

Hawaii’s so-called “privacy act” should be substantially rewritten,” state Rep. Donna Ikeda, R-21st Dist. (Kalama-Hawaii Kai) believes.

Ikeda said she’ll propose legislation that would limit occasions in which the government can withhold information on the basis of privacy.

“The intention of the law has been twisted,” Ikeda said in a statement. “Instead of being used to promote openness in government, as was originally intended, the Fair Information Act is being used as a barrier to freedom of information.”

Ikeda said problems have been encountered in attempts to gain information about child care centers, and about response times for ambulances in the Hawaii Kai area.

Ikeda wants a law that allows information to be withheld only when there is a “clearly unwarranted invasion of privacy.” Disclosure would be required when the public interest outweighs the privacy interests.
State Privacy Law Should Be Revised

When the Star-Bulletin tried to investigate a case of child abduction and rape at a Windward Oahu preschool, we found that state records of inspections at child care facilities were closed to the public. The Legislature subsequently voted to change the law to permit limited public inspection of those records.

That situation was an example of the difficulties created by the 1980 state privacy law and the restrictive way it has been interpreted. Now several civic organizations have banded together to lobby for revision of the law. They are Common Cause, the League of Women Voters, the American Association of University Women, the Hawaii Council of Churches legislative committee, and the Society of Professional Journalists/Sigma Delta Chi.

The idea is to facilitate access to government records without infringing on legitimate rights to privacy. The group, called the Sunshine Coalition, says it will seek a clearer definition of what records should be available to the public. Hawaii's law presumes that most records should be closed; the opposite should be the case.

It may never be possible to strike a perfect balance between the need for privacy and the need for public access to government information. But it is apparent to many people that the present law places too much emphasis on privacy — and that the public should be entitled to more information than it is getting.
Editors Warned About Privacy

Panel discussions on ethics, credibility and privacy dominated the morning agenda at the convention, which continues through Friday.

Newspapers were urged to correct themselves quickly when wrong, to be receptive to and act on public criticism, to avoid the appearance of arrogance and to explain, when possible, controversial editing decisions.

It is “vital that sensitivities to readers and their concerns not be a passing fad,” said Gene Foreman, managing editor of the Philadelphia Inquirer and chairman of APME’s credibility committee.

“You’re timid, inarticulate, at worst silent,” in explaining decisions that result in a person’s privacy being invaded, said William L. Green, vice president for university relations at Duke University. “Your power to affect lives permanently is almost without limit.”

“The thing that worries me is the public perception of how you handle it. You don’t come out very well,” Green said.

Papers should consider ethical ramifications when deciding that news takes precedence over privacy, said Eugene Goodwin, a professor of journalism at Penn State University.

What needs to be asked, Goodwin said, is, “Does the public need to know?” and “How much harm is apt to result?”

Panelists also discussed whether the “innocent victims” — people related to victims of crime or tragedy — should be considered in news decisions.

“Why should journalists be exempt when all other professionals, such as police, lawyers and doctors, must protect their innocent victims?” asked Dr. Arthur Caplan, a philosopher on the staff of The Hastings Institute, a think tank.
Group Says Privacy Law Misused

By Stirling Matia
Star-Bulletin Writer

A state law intended to protect individuals' privacy has been used by government officials to keep information away from the public, a civic group leader said yesterday.

As a result of the 1980 law, people can't find out information about public employees or possible government misconduct, or learn whether ambulance service is adequate in their area and what criteria were used in choosing a developer for a contracted project.

Since the so-called privacy law went into effect, the list of government records withheld from the public has been growing, said Ian Lind, coordinator of the Sunshine Coalition, which is made up of a number of civic groups.

Because of that, the coalition has decided that the law needs some changes and will offer proposals to the Legislature next year.

"From our own perspective, the ambiguities in the current law have been exploited in order to withhold information that belongs to the public," said Lind, who is also executive director of Common Cause/Hawaii.

"We don't want to look at a person's bank account or anything like that. But we want to make sure the public's bank account is available to the public." In 1980, state lawmakers were in a hurry to enact a law allowing out a newly passed state constitutional amendment on "personal privacy before the courts fashioned their own interpretations.

Although legislators never intended to restrict access to traditionally open records, government officials have cited the law in keeping some such records secret.

The major problem, Lind said, is that legislators took a draft copy prepared by the Uniform Law Commissioners and enacted it. Months later, the group, which proposes model laws for consideration by all states, came out with a final version that was radically different, Lind said.

The final version presumed all government records are open except a limited number, but Hawaii's law assumes most records are to be closed except for a few, Lind said.

In essence, Lind said, "We are penalized for being out in front in terms of privacy."

THE COALITION won't be proposing large-scale changes to Hawaii's privacy law, but will try to delve into it with the Uniform Law Commissioners' proposal to get a clearer definition on what records should be shown to the public. Lind said.

The coalition is composed of Common Cause, League of Women Voters, American Association of University Women, Hawaii Council of Churches legislative

Group Says Privacy Law Is Misused

Continued from Page One

The committee and the Society of Professional Journalists/Sigma Delta Chi.

Only the Sigma Delta Chi chapter has yet to approve the proposal, but its president, Buck Buchwach, said the chapter generally supports the coalition's efforts on the privacy law.

The Legislature moved earlier this year to open some state records. The state government had blocked the Star-Bulletin from reviewing records of state inspection of child-care facilities after a March child-abduction "case at a Kaneohe preschool." The Legislature changed the law to permit public inspection of the kind of records.

"I THINK there is agreement that the law needs changing," Lind said, noting that clearer definitions will help government officials avoid lawsuits and public criticism for withholding records.

"Everybody runs into the need for government information periodically." Lind said.
Court Asked to Bar Mehau Reports

By Lee Cotteroll
Star-Bulletin Writer

HONOLULU — Police and the Hawaii Crime Commission today urged the state Supreme Court to block an attempt to obtain information about a confidential document in the Larry Mehau libel case.

The high court is expected to rule later this year on whether to uphold a Circuit Judge's approval of what Justice Frank Padgett termed United Press International's "drag net subpoena" of Honolulu Police Department and Crime Commission records.

Three of the five justices — Chief Justice Herman Lum and Justices Yoshihisa Hayashi and James Wakatsuki — excused themselves from hearing the case today. Lum and Hayashi have said they know people involved in the case.

Padgett excused himself from a hearing in the case in 1977, saying he had expressed an opinion of the case when he was in private law practice. He was not available for comment after today's session to say why he sat on the case today. Wakatsuki also was not available.

DEPUTY Attorney General Keith Kaneshiro and Deputy Corporation Counsel Wesley Fong argued that the earlier ruling by Circuit Judge Richard Au, if upheld, would violate the privacy of people mentioned in the documents.

UPI attorney Paul Alston said the documents could support the contention that allegations made in articles published in 1977 were true or, at least, not made recklessly.

The degree of "recklessness" is important in a libel case brought by a public figure because he must prove that a defendant acted with malice in publishing the article. The question of whether Mehau should be regarded as a public figure has yet to be determined in the case.

MEHAU, a state Land Board member in 1977, is suing UPI, former state Rep. Kinau Ramai'i, the now-defunct Valley Isle newspaper on Maui and former Valley Isle publisher Rick Reed, now an aide to City Prosecutor Charles Marsland.

The Valley Isle articles described Mehau, a close friend and political supporter of Gov. George Ariyoshi, as being the "godfather" of organized crime in Hawaii.

Judge Au in July ruled that police and the Crime Commission should provide an "index" and "analysis" of documents sought by UPI.

Alston said the documents may support the contention that the Valley Isle information, which was reprinted by UPI, was true.

Alston said the documents could refute any contention by Mehau that allegations in the stories were made recklessly. The high court has ruled that an article's "reckless" nature should be determined by whether its allegations are so "improbable" that a "reasonable" person would not circulate them.
City, State Differ on Handing Over Data on Licenses

City and state officials are at odds over the question of providing information in driver's licenses to the Selective Service System.

Every state except Hawaii and Montana provides computerized tapes giving the names, ages and addresses of newly licensed drivers, according to the Associated Press.

City officials contend that releasing such information would violate privacy laws while state officials say it is within their right to share the licensing data.

The city corporation counsel last year issued an opinion saying that personal information volunteered in order to obtain a driver's license could not be used by other agencies for other purposes without violating privacy laws.

The state attorney general's office several months ago issued its opinion that the state has a right to collect such information and to share it with other agencies.

NO HAWAII licensing information has yet been released to the Selective Service, however, while the situation remains in limbo.

Montana officials say their state's privacy law prohibits sharing such information with anyone.

The federal government says it routinely screens the names of 18-year-old men who get driver's licenses to make sure they have registered with the Selective Service System for the standby draft.

Newly licensed drivers who are not registered with Selective Service get a letter reminding them that males are required to register within 30 days of turning 18, according to Col. Will Ebel, director of government and public affairs at Selective Service.

Ebel called the system almost foolproof. "It's pretty hard to find an 18-year-old male who does not have a driver's license," he told the Associated Press last week.

But the American Civil Liberties Union objects to the practice.

"As a matter of public poli..."
Supreme Court backs police in 'bugging' case

By Ken Kobayashi

In another in a series of split decisions by the Hawaii Supreme Court on police recording of suspects' conversations, the high court has ruled 3-2 for the prosecution in a drug case against Honolulu pediatrician Michael K. Lee.

The majority ruled that conversations recorded in Lee's office with a "bug" worn by an undercover agent posing as a patient are admissible as prosecution evidence at Lee's trial.

Chief Justice Herman Lum, who wrote the majority opinion, was joined by associate justices Frank Padgett and Yoshimi Hayashi.

The dissenting opinion, written by Associate Justice James Wakatsuki, found that the recordings violated Lee's constitutional rights to privacy and violated the Hawaii Wiretap Law. Associate Justice Edward Nakamura joined in the dissent.

The high court has split along similar lines in upholding the use of other recordings of conversations by suspects.

These cases concern police recording conversations without first obtaining a warrant from a state judge permitting the taping.

In one exception, the high court last year unanimously barred the use of recordings of psychiatrist Pershing S. Lo's conversations in a hotel room with a patient who was cooperating with the government.

The major exception is that in Lo's case, the electronic devices were installed in the hotel room. In Lee's case, the recording device was not installed in Lee's office, but was worn by the undercover agent.

Installation of a recording device might require a "greater invasion of privacy" because it requires a "surreptitious entry," according to the majority.

But the minority opinion said how the recording device got into Lee's office is not "relevant." The minority opinion said "what is paramount" is that Lee's privacy, in his own office "should be fully protected."

Lee is charged with three counts of prescribing drugs — a sedative and tranquilizer — for non-medical reasons in 1979 and 1980.
Public May View Hotel Project Plans

SAT JUL 21 1993 B5 H
By Gregg R. Kakeako
Star-Bulletin Writer

In response to a request from Common Cause Hawaii, city officials yesterday said that they would allow public inspection of proposals submitted for the Kaka'ako hotel project.

Common Cause, the citizens' watchdog group, had been trying since December to review the development plans submitted for the city's proposed downtown hotel.

In a Dec. 12 letter to Joseph Conant, director of the Department of Housing and Community Development, Ian Lind, Common Cause executive director, argued that the proposals are public records under the state's Government Information Law.

In a May 23 letter, Conant said that the proposals were not available because negotiations still were continuing with the developers, who had not authorized the release of their materials. Three of the four developers are no longer in the running.

In response, Lind said the development proposals were "voluntarily submitted" to the city by those seeking to do business with the city.

"It seems unlikely that trade secrets would be disclosed in such proposals, and in any case the burden of proof rests with the developer to show that trade secrets were present."

Conant said in his May letter that at least one developer — Central Pacific Development — protested, claiming "its proposal contains confidential and privileged information."

Lind yesterday praised Conant's decision to make the proposals available for public inspection, saying the city's action is "long overdue."

"This is clearly a decision which affirms the public's right to know," Lind said. "These proposals are of direct public interest, since they would involve the utilization of public property for private development."

He said he hopes the city's action on the Kaka'ako project will extend to other issues.
No privacy rights in a prison cell, high court

WASHINGTON — For the first time, the Supreme Court ruled yesterday that prisoners have no right of privacy in their cells and therefore no constitutional protection against unreasonable searches and seizures of even their most personal possessions.

In addition, the justices concluded that prisoners have no constitutional right to employ their wives, children and other family members.

The 5-4 search ruling, upheld Justice John Paul Stevens that he read aloud excerpt from his stinging dissent, saying with noticeable emotion that the case involved "the difference between savagery and humanity."

"To hold that prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary, malicious or cruel destruction would not, in my judgment, comport with any civilized standard of decency," Stevens said.

In that case, Hudson vs. Palmer, the high court dealt with the civil rights complaint of Russell Thomas Palmer, an inmate in a Bland, Va., prison who said that a guard, ted S. Hudson, had vindictively destroyed "personal materials, letters and other personal property" after a "shakedown of his cell.

Chief Justice Warren E. Burger — joined by Byron White, William Rehnquist, Lewis Powell and Sandra Day O'Connor — rejected the complaint, saying that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell."

And so, Burger concluded, the Fourth Amendment bar to unreasonable searches and seizures "does not apply within the confines of the prison cell."

rules

drugs and other contraband," Burger wrote.

He said that the remedy for prisoners is a suit for compensation for destroyed property.

Stevens' dissent, signed by William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun, accused the court majority of exaggerating prison violence.

"Personal letters, snapshots of family members, a Souvenir, a deck of cards ... perhaps a diary ... or even a Bible ... may enable a prisoner to maintain contact with some part of his past and an eye to the possibility of a better future," Stevens wrote.

In the case of Block vs. Rutherford, the same majority plus Blackmun upheld a Los Angeles County Central Jail ban on all "contact visits" between men awaiting trials and their families and said prisoners have no right to witness random searches of their cells.

A federal judge had ordered that low-risk prisoners detained for more than a month be allowed contact visits, saying it was traumatic and unconstitutional deprivation of liberty to deprive an inmate of "any opportunity to embrace his wife or hug his children." for a long period. The U.S. Court of Appeals in California agreed.

But Burger's majority opinion concluded that the ban was justified on grounds of prison security. Guns, knives or drugs "can readily be slipped from the clothing of an innocent child," the chief justice de-
Inmates' Privacy Claim

Supreme Court Says Prisoners Cannot Challenge Searches and

TUE JUL 3  1984  S 8 H

by Richard Corelli

WASHINGTON (AP) — Prison inmates have absolutely no right of privacy and in reto cannot challenge allegedly unreasonable searches and seizures, the Supreme Court ruled by a 5-4 vote today.

"Society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell," Chief Justice Warren E. Burger wrote for the court.

In a separate ruling, reached by a 6-3 vote, the court ruled that jail inmates awaiting trial have no constitutional right to "contact visitation" with their spouses and children.

And by that same 6-3 vote, the court said unconvicted jail inmates awaiting trial also have no right to be present when their cells are searched.

In other action today, the court:

 Upheld a Minnesota law which requires the Jaycees to grant full membership to women. The effect of the ruling on other male-only organizations, as well as groups whose memberships are based on religious belief or national origin, is not yet clear.

 Ruled 5-4 that private citizens lack the legal standing to sue the federal government into denying or revoking tax breaks to racially discriminatory private schools, the Supreme Court ruled today. The ruling, a significant setback for civil rights activists, greatly limits the effect of the court's 1983 decision upholding an Internal Revenue Service policy of denying tax-exempt status to discriminatory private schools.

Denied

Seizures

currency in its magazines to illustrate articles, had argued that the law limited free expression.

The decision today against prison inmates' privacy rights sparked Justice John Paul Stevens, who wrote for the four dissenters, to quote from the bench at unusual length portions of his dissenting opinion.

Stevens said today's decision

Turn to Page A-4, Col. 1
No Privacy for Inmate, Court Says

Continued from Page One

which means "that no matter how malicious, destructive or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable."

Stevens added: "By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence."

The court’s opinion does not mean that prisoners whose property is destroyed or seized cannot sue guards or other prison officials. But those lawsuits now cannot be based on any asserted constitutional right. They presumably must be based on some right provided by state law.

"We hold that the Fourth Amendment (protecting against unreasonable searches and seizures) has no applicability to a prison cell," Burger wrote in overturning a federal appeals court ruling that would have allowed a Virginia prison inmate to sue on constitutional grounds.

He was joined by Justices Byron R. White, Lewis F. Powell, William H. Rehnquist and Sandra Day O'Connor.

Stevens' dissent was joined by Justices William J. Brennan, Thurgood Marshall and Harry A. Blackman.
Child Care Records
Law Brings Results

The new law opening state records on preschools and babysitters to the public is apparently doing what it was intended to do.

Since Gov. Ariyoshi signed the bill last week, four instances of state action against child care centers in the past two years have come to light. MON JUN 25 1984 SB A

Records show that the licenses of one preschool and one babysitting operation were revoked and that two other preschools were issued suspensions.

The new law was prompted by the abduction and rape of children from a Windward Oahu preschool in March. Inquiries by Star-Bulletin reporters found that the state Department of Social Services and Housing’s records on the licensing and inspection of preschools and babysitters were closed to public scrutiny.

The recent disclosures of state action against the three preschools and the babysitting operation are a clear indication that the new law was needed and that it works. It serves the parents well, by enabling them to be better informed about the institutions and individuals to whom they entrust their children, and it advances the cause of openness and accountability in government.
Big Island Police and Public Records

Public confidence in the police is essential to effective law enforcement.

The benefits to the police — and to all of us — from that public confidence are enormous. Witnesses to crimes are more willing to come forth because they trust the police. Citizens are more likely to volunteer information about suspicious activities they observe. Minority groups are less likely to be hostile to police officers and more willing to cooperate in solving crimes. Recruiting good police officers is made easier.

It is hard for a department to win, or deserve, community support unless it enforces the law equally without favoritism and punishes misconduct by officers.

Records exist in every department that can establish whether those two crucial tests are being met. Unfortunately, those records frequently are not open to the public's inspection because of police departments' internal policies.

This week, the Hawaii County Police Commission heard testimony from two journalists, representing the Star-Bulletin and the Associated Press, urging that Big Island police allow more public access to certain kinds of records. The commission agreed to study the issue, and put off implementing a consultant's report that supported keeping many records off limits to the public.

Two basic kinds of records, if consistently made public, would have a strong impact on public confidence in the police: (1) the officer's complaint report filed out at the scene of a crime or accident and (2) results of department investigations which lead to disciplinary actions against officers.

Editorial

If the public cannot learn who was arrested and such basic information as the name of the victim (except in rape and sex abuse cases) and details of the crime or accident, the average citizen is left to suspect that some crimes and arrests may secretly have been disposed of through political connections or police friendships. If the public cannot learn whether the police actively investigate complaints against officers and take action when justified, the average citizen may wonder whether there are any checks or the conduct of police officers.

SAT JUN 23 1984 S 8 H
Victory for Public’s Right to Know

By signing a bill opening state records on preschools and babysitters to the public, Gov. Ariyoshi has advanced the cause of openness and accountability in government. More specifically, he has made it possible for concerned parents to become better informed about the institutions and individuals to whom they entrust their children.

This legislation had its origin in the abduction and rape of children from a Windward Oahu preschool in March. The state subsequently closed the school for more than a month while improvements in its security were made.

Shortly after the incident, the Star-Bulletin discovered that the state Department of Social Services and Housing’s records on the licensing and inspection of preschools and babysitters were closed to public view. Such information on an industry that is licensed and inspected by the state, and that provides services for children, we felt, should be available to the public, and especially to parents. As an organization dedicated to informing our readers about the operations of their government, we felt an obligation to try to get this situation corrected.

Bills already under consideration in the state Legislature were amended, with our encouragement, to provide for public disclosure of the records. The final product of these efforts as it emerged from a House-Senate conference did not go as far as we wanted in opening the files, but it represented a big improvement over the previous situation, and we reluctantly recommended its passage.

Our objections had to do with the provisions requiring the state to disclose records going back two years (rather than four years), and exempting from disclosure complaints about alleged criminal offenses until investigations had been completed.

Despite our reservations, we see the governor’s approval as a major step in an effort to make official information accessible to the public. But there are other areas of government in which more openness is needed, and we hope the governor and the Legislature will be as receptive to such proposals as they have been with regard to the preschool problem.
Public denied access to HPD media guide

The Honolulu Police Department wants to foster "friendly openness" with reporters, but the department will not reveal its specific rules on media relations.

These rules are outlined in HPD's General Orders 80-35 and 80-19. Ian Lind of Common Cause and The Advertiser asked to see the orders, but the requests were denied by the police department and by city Corporation Counsel Gary Slovin.

For 18 months, Lind has been trying to get a copy of HPD's general orders. He believes that state law requires such "rules and written statements of policy" to be public. Slovin disagrees. He wrote Lind after Common Cause's latest request and said, "The Legislature has made it clear that the HPD documents you seek are not subject to public inspection."

HPD's legal adviser Timothy Liu told The Advertiser that the department's "general orders are strictly for internal department management and are not distributed to the public."

Common Cause's latest request followed an April 1 newspaper commentary by Police Chief Douglas Gibb. Gibb wrote, "It is my policy to foster a friendly 'openness' with the media. I see police/media relations as a two-way street, where courtesy and cooperation flow both ways with a spirit of mutual respect."

Gibb also said department orders on the subject are summarized in the department's "News Media Relations" pamphlet, which is available at HPD's Information Office, Room 210.
Bill on investigative panels goes to legislative conference

By Sandra S. Oshiro
Adviser Government Bureau

Lawmakers are headed for more debate on a proposal to allow legislative investigative committees to keep much of their work secret.

The measure grew out of the Senate's investigation two years ago of the pesticide contamination of local milk. The House approved the bill on a 28-20 vote (with three members excused) last Monday after heated debate.

Supporters of the bill said people were reluctant to provide information to the heptachlor committee because there was no guarantee of confidentiality. MON APR 9 1984 AD

But opponents said the bill's drafters went too far.

Committees are now required to keep only "defamatory or highly prejudicial" information confidential. The information can't be made public unless a majority of the committee agrees or a court requires its release.

The bill would expand the types of information that must be kept secret to include trade secrets; information that might jeopardize an individual's employment, life or safety; records that would constitute a "clearly unwarranted invasion of privacy"; and any other records that the committee chairman decides should be kept sealed.

The proposal also would prevent any of the information from being disclosed to anyone, even if a court orders its release, unless the Senate president or House speaker approves. The records would be stored for 10 years, then destroyed.

"It is a bill that makes me realize what year we are living in," said Rep. David Hagino in a reference to "1984," George Orwell's book with its vision of a totalitarian society.

Judiciary Chairwoman Kathleen Stanie, defended the bill. She said that by specifying more of the types of information that must be kept secret, the bill could actually discourage the formation of investigative committees.

The issue is bound for a conference committee, Stanley said.
Tightening Secrecy for Legislative Probes

A state Senate bill securing confidential records of legislative investigations encountered strong opposition when it emerged on the floor of the House of Representatives. The bill passed on a 27-21 vote, but might be substantially revised in conference.

Rep. David Hagino charged that the measure would promote "far greater secrecy in government than we need." Rep. Ron Menor said it would "undercut the values of open and public debate."

The bill provides that materials or information received by legislative investigative committees be considered confidential until made public by the president of the Senate or speaker of the House.

The intent of the bill seems to be to ensure persons cooperating with legislative investigations that their requests for confidentiality would be respected, and thereby encourage such cooperation.

That is a reasonable objective, but the provisions seem too broad and subject to abuse by those seeking to conceal embarrassing facts. Moreover, it is not clear that any legislation is needed to protect legitimate requests for confidentiality in these situations.

One bill seeking to provide public access to state records dealing with child care — inspired by the recent abduction-rape case at a Windward Oahu preschool — is now moving through the Legislature. But it is important to maintain openness in government in other areas as well.

In the case of material produced in legislative investigations, there are certainly situations in which public disclosure would be unwise. But this proposal seems to go too far in sanctioning secrecy. It should be reviewed to ensure maximum disclosure consistent with legitimate reasons for confidentiality.
Making public files private

By George Chaplin
Editor in Chief, The Honolulu Advertiser

The Founders imbedded the First Amendment in the Bill of Rights not for the benefit of the press, but for the benefit of the public. They wanted a press free to report on what government is doing, a press that would see to it that the government, not the governed, get the government.

The rationale was simple, but fundamental to the operation of a democratic society: the people should have the fullest knowledge of what their government is doing so that they can make intelligent judgments on the issues of the day.

GOVERNMENT AT all levels — federal, state, local — not infrequently seeks to conceal information for any of several reasons.

One is that such information may prove embarrassing, reflecting anything from sloppiness to highly injurious behavior all the way to active malfeasance.

That's one reason why so many documents in Washington are stamped "classified" when national security is not an issue.

Another reason why a government agency will try to withhold information is that its release can add to its work load, can result in questions being asked or demands being made for removal action.

For some in government, life is simply easier if the files are closed in the very public which those in official positions are supposed to be serving.

THE LEGISLATURE showed its awareness of the importance of openness when in 1972 it declared the following policy:

"In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formulation and conduct of public policy.

"Opening up 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;
3) The provisions providing for exceptions to the open meeting requirement shall be strictly construed against closed meetings."

That covers most regarding meetings, although the spirit and the actuality are at times quite different.

AS TO FILES and records, the Constitutional Convention of 1978 declared that every citizen will have the right to privacy and then said, in effect, let the Legislature figure it all out.

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The result was a hybrid of legislation, Charter 32-2, in part good, in part bad.

ONE GOOD PART generally prohibits one agency of government — say the State Tax Department — from giving information about a citizen to another agency.

Another good part allows a citizen access to information in government files about himself or herself, so any errors can be brought to the attention of the agency involved.

Now to the bad parts of the privacy statute. One is in defining what a personal record is and in denying that information to anyone other than the individual named therein.

A personal record is defined as any "information about an individual that is maintained by an agency."

THE STATUTE goes on to say that "a personal record includes a public record that is defined in Section 25-50, which deals with access to public records."

The result is that much more recent law, which deals much more closely with the public records law. With a few words a public record is converted into a private one — and thus a secret record.

As Honolulu Attorney Jere Portoyer, a First Amendment specialist, and recently regarding treatment of files under the privacy statute, said it makes no difference whether
testimony is an elected official's; a state agency paid out of public funds; or a bureaucrat — the statute has been used to deny access to on an unlimited number of records.

HAWAII IS A place about which we all care deeply. We want our state to be progressive — and to be recognized as such throughout the nation.

But, sad to say, in the area of government openness, we currently have a sorry record. The attitude is represented by the office in the Attorney General's office, appears to be that everything is proper and if it's open, you can't have a court order or by the kind of public pressure evidence in the recent preschool tragedy.

That's exactly the opposite of what the public should be.

ON MARCH 7 The Advertiser asked Deputy Attorney General Thomas Farrell about public access to the state's files on preschools. As he said it would be a violation of the privacy law. The State Bulletin asked for the same information that was also rebuffed.

This general attitude of being more interested in keeping records closed rather than seeing how they can be made open has seemed to be almost a state article of faith in the AG's office.

THAT'S BEEN evident in such cases as the following, from 4/14/84, cited by Portoyer:

* This state administration attempted to seal sewer records kept by the State Department of Health until a court judge ordered them released in an opinion which blasted the administration's attempt at secrecy.
* This administration refused to release a report prepared by a security guard company as to why it deserved to be awarded a public contract until UTV television station threatened litigation.

THE CURRENT interest in making access to State records to schools and licensed day-care centers is commendable. But all in the administration should also take a broader look to strike a blow for genuine government openness.

Secrecy is a hallmark of a free society. It is alien to the idea of open, fair, and free society. It is alien to the idea of open, fair, and free society.
Opening those records

While there are differences between the House and Senate on the question, the Legislature should be able to reach a reasonable compromise on how to provide the public more information on complaints made against state-licensed preschools and day-care centers.

The need for such action was dramatized by the recent abduction of three small children from a Windward Cahu preschool. One of the three was raped.

At the time, both The Advertiser and Star-Bulletin were told that state files on inspections of and complaints against such schools could not be made public because they contained information on individuals and so must remain closed under the privacy law.

EFFORTS by the state Administration and Legislature to open up such files to the public in a reasonable manner are appreciated. The public needs and deserves more information on what may be wrong with the preschools and day-care centers to which it entrusts its children.

But at best the result will be piecemeal action. For, as we at The Advertiser have stressed before, this situation represents only part of a larger problem of too much state secrecy clothed in a 1980 state privacy law that is good in some ways and bad in others.

As an adjoining article points out, protecting a person’s privacy is a proper concern. But we have a situation where the inclusion of one name can be used as justification for turning what should be a public record into a secret one.

As a result, all kinds of information on our state and county governments that should be open to the public (and the media that inform it) is kept closed.

Much of the problem seems to be misinterpretation of the privacy law by sincere people in the attorney general’s office. Still, potential for deliberate abuses and cover-ups is there.

IN THE FACE of this larg
Privacy Law Becomes a Pressing Problem

By Stirling Morita

Taxpayers today can find out how much a government official is being paid, although in previous years the salary information was readily available.

The public can’t get information about which police officers have been recommended for disciplinary action by the Honolulu Police Commission.

Parents can’t find out about possible complaints against a day-care center their children attend.

The public can’t find out who was a particular motor vehicle, for can the public learn who has benefitted from the state’s Home Improvement program or the names of applicants.

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Privacy laws have their roots in the fear that government will invade the lives of ordinary citizens.

It is ironic that a law based on the fear that government will do something wrong to individuals has ended up as a possible way of hiding government wrongdoing.

Turn to Page A11

Continued from Page One

THE 1980 LAW restricts the public from seeing government-held records about a person’s educational, financial, medical or employment history.

However, the law wanders into a gray area when it also prevents the public from seeing records containing “reference to the individual’s name, identifying number, symbol, or other information particular to the individual, such as finger or voice print or a photograph.”

When the law was passed in 1980, it was the first time in Hawaii’s history that state statute detailed what kind of records are of a personal nature and, therefore, are closed to public scrutiny.

Ian Lind, executive director of Common Cause/Hawaii, said the state constitutional amendment that led to the privacy statute fails for withholding of records involving “highly personal and intimate affairs.” In dealing with cases involving privacy, the courts have concentrated on government intrusions into personal matters, such as religion and contraception, and matters of personal choice, such as hair styles.

Lind, in an interview, said Hawaii’s privacy law is too broadly defined and affects disclosure of almost any kind of public record.

The attorney general’s office is telling persons who request government records that they are denied under the privacy law.

THE STATE’s attorneys are forcing people to file lawsuits to find out if government records should be open, leaving decisions on public access to records in the hands of judges instead of administrators, Lind said.

Linda Hills, director of the American Civil Liberties Union (ACLU) of Hawaii, which is a strong supporter of the concept of privacy but sensitive to the public’s right to know, said problems might be occurring because government attorneys may be misinterpreting Hawaii’s privacy law.

People are entitled to privacy under the law, not government operations of businesses regulated by government, she said.

Under the law, the state attorney general’s office and county attorneys have the power to determine which so-called personal records the public can see, depending on the records requested.

The privacy law has drawn public attention recently because the state has refused the Star-Bulletin’s request to review reports about child-care facilities prepared by state inspectors. The newspaper has filed suit in the courts. Volumes of reports which have been “sanitized” by deleting information about individuals named in the reports.

The privacy law is a product of two years of lawmakers’ work to flesh out a 1978 constitutional amendment.

The 1978 Constitutional Convention declared that the amendment was not intended to restrict public access to government records that have traditionally been public.

However, state legislators in working out the law thought that it needed to be clearly defined because of what had happened in a similar situation in Alaska.

(continued)
Media want Constitution to shield sources, open government records

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By DOUGLAS WOÓ AND GERALD KATO
Honolulu Advertiser Bureau

Open access to government records and protection of news reporters' sources should be included in Hawaii's Constitution to ensure the public's "right to know," a Constitutional Convention committee was told last night.

Those sentiments were expressed by a few speakers representing virtually all of Hawaii's news-gathering organizations during the Con Con's first public hearing at the old federal building.

The testimony was in support of several proposed amendments being considered by the Committee on Bills of Rights, Suffrage and Elections, which held the hearing.

The committee also took testimony that was overwhelmingly favorable to the grassroots issues of initiative, referendum and recall during the latter half of its hearing.

The public's right to know was stressed by all who testified on behalf of a shield law for reporters and more accessibility to government records and proceedings.

"We view the concept of the right to know as being interwoven with open government and the protection of confidential news sources," said Marcia Reynolds, Associated Press Club president, who spoke for virtually all news-gathering businesses and groups in the state.

"The basic right of the public to know is derived if government is not open. Access to public records and documents is blocked and a reporter is not able to guarantee protection for confidential sources of information," Reynolds said.

A few committee members expressed concern about giving reporters the legal right to withhold the identities of confidential sources.

"What about the rights of the accused to know who is accusing him?" asked Caucus Chairmanship Committee member Yoshihiko Hayashi. He later added that a shield provision might hurt an average citizen who is unjustly accused in the media of wrongdoing.

Reynolds responded that in such a situation the citizen could sue for libel or slander.

Other concerns expressed by committee members were that a shield provision could be used by a few to start a publication for the singular purpose of a vendetta against an individual and that reporters should have a code of ethics.

But a few who testified urged the convention to propose the shield law for the Constitution instead of leaving it up to legislators.

Legislators may consider such a law a "special privilege" for reporters instead of a right, explained Peter Rosegg, speaking for the Honolulu Journalists Association.

"What lawmakers give they can take away, the reasoning goes, and in the meantime this 'favor' can be held over the heads of newspeople," he said.

A proposal to incorporate a similar shield law into Honolulu's charter ran into some criticism from two councilmen yesterday. They questioned the purpose of allowing journalists to refuse to disclose their confidential sources when summoned before city agencies.

Conciliation George Akamine said that with such a charter amendment, some journalists might consider "fabricating" stories.

"I feel there is not enough checks and balance," Akamine said during a council committee meeting.

Councilman Daniel Clement then injected the issue of disclosure into the discussion. Young news media support for financial, disclosure legislation, Clement said there cannot be demands for disclosure from one segment of society, with failure to disclose by another segment of society.

Akamine said if politicians must make disclosures, so should members of the news media. With apparent allusions to a recent Ethics Commission investigation of him begun because of newspaper articles involving his real estate dealings, Akamine said:

"They want to make me a mirror. Let's put them in the mirror."

The proposed charter amendment was passed out of the Intergovernmental Relations Committee on first reading.
ACLU Says State Needs a Task Force on Crime

By the Associated Press

The American Civil Liberties Union says that if the state Legislature really is concerned about fighting organized crime, it should create a statewide crime task force.

ACLU spokesman Addison Bowman, a law professor at the University of Hawaii, argued that wiretapping is not the answer to halting the activities of organized crime.

He testified during a Senate Judiciary Committee hearing yesterday on a proposed new wiretap law, already approved by the state House, that would broaden the instances in which local law enforcement agencies could use wiretaps.

The bill is geared toward organized crime and such serious offenses as murder and kidnapping.

"RIGHT NOW we don't have any law enforcement agency geared, staffed and funded to handle organized crime," Bowman said. "It is dreaming to believe that wiretapping will help."

Bowman said it costs up to $11,000 for each wiretap, not including the cost of equipment. That figure was not disputed by Honolulu Police Capt. Harold Kawasaki, head of the Criminal Investigation Division, although he said he was uncertain about the exact cost.

"If the Legislature is going to spend money to fight crime, the money would be much better spent in creating a statewide task force, who could then reasonably assess if there is a need to use wiretapping," Bowman said.

The ACLU is opposed to any wiretap law on the ground that it intrudes upon a person's right to privacy. However, Bowman said that if the Legislature is going to pass a new law, it wants as many safeguards as possible.

CURRENT LAW ALLOWS wiretaps by local police only with the consent of at least one party to a conversation or if federal agents are involved. The proposed law would allow police to obtain permission from the courts to wiretap.

Capt. Kawasaki testified that "criminals make extensive use of wire and oral communications in their activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."

According to Jim Countias, legal counsel for the Hawaii Crime Commission, the three instances in which FBI agents used wiretaps in Hawaii were "very successful," leading to the prosecution of alleged local underworld figures Wilford "Nappy" Pulawa and Earl Kim.

Countias said there still are "significant safeguards" against unwarranted invasion of privacy in the wiretap bill suggested by the commission.
Council Approves Bill for Rules on Public Records

The city managing director's office would have to establish rules and regulations about what paperwork is public record under a bill adopted yesterday by the City Council.

The bill says records determined to be of public interest or for disclosure should be available where they are stored.

Also, a list of what records that will be kept confidential should be made available so persons could contest whether the documents should be made public, the bill's sponsor, Councilman Kekoa D. Kaapu, said.

There have been problems "of which records are available to the public," Kaapu said. "I and others have had problems."

Mayor Richard K. Sharpless has said he thought that the city administration should determine which records should be made available. He added that his office would cooperate fully.

SHARPLESS HAD asked the city corporation counsel's office to go through Honolulu Liquor Commission records, and the corporation's office determined which parts of the various files can be open for public inspection.

The bill goes to Mayor Frank F. Fasi's office for his consideration.

In other business, the Council waded through a parliamentary snafu in approving a bill for a detailed land use map change for a two-acre site at Likelike and Kamehameha highways in Kaneohe.

In the first vote on Edward K. Kageyama's request for a map change from residential to commercial for a shopping center, the Council approved it with Councilman Wilbert "Sandy" Holck, who represents the area, dissenting.

Later, Holck asked that his vote be switched to yes. But in the afternoon session, Holck, noting that he had gotten mixed up on the bill, asked to switch his vote back to "no."

THEN THE QUESTION of whether a reconsideration vote could be taken the same day arose, and the Council approved a reconsideration motion. But city attorneys discussed whether the reconsideration vote could be taken the same day, and a half hour later, the Council approved the measure allowing Holck to record his dissenting vote.

In other action, a bill to permit the city auditorium director and tenant to allow persons to bring liquor into the Waikiki Shell on special liquor permits failed to get the support of the Council.

The vote was 3-1, but the bill is still alive because in order to defeat or pass a bill, five councilmen must vote on either side.

Councilman George M. "Scotty" Koga disagreed with the plan because he was concerned about control of liquor and patrons.
Clients of HMSA

Will Organize

The HMSA Clients Association, a group of individuals concerned about the Hawaii Medical Service Association's investigation into confidential files, will hold an organizational meeting at 7:30 p.m. tomorrow in the Waikiki-Kapahulu Library auditorium.

Any past or present HMSA member is invited to attend.

Earlier this month, an administrative officer of the HMSA asked Women's Counseling Clinic and Center for the confidential case records of 19 patients.

The clinic refused.

However, its refusal to turn over or allow the photocopying of records, has not caused the HMSA to deny the insurance claims of these patients.

Meanwhile, the ACLU here, said that if the HMSA denies the insurance claims of the center's patients, a suit will be filed against the insurance carrier. "If our clients want us to take the matter to court."
Access to Public Records Is Debated

By Mary Adomski
Star-Bulletin Writer

There is no such thing as a "right to privacy" spelled out in the Constitution as are the freedom of speech and religion, a government attorney said last night.

But the principle of an American citizen's right to privacy has evolved through other laws and court decisions that restrict government interference in his life, said Charlotte Libman, a State deputy attorney general.

She was one of six panelists discussing the accessibility of the public records of government agencies to the public—and especially to the news media.

The panel, which appeared before a still-unnamed organization of journalists from local newspapers and television stations, also included William Eggers, assistant U.S. attorney; Ronald

Honolulu Star-Bulletin

Amemiya, State attorney general; Jon Van Dyke, professor of constitutional law at the University of Hawaii; Richard Sharpless, City managing director; and Eugene Fletcher, Honolulu deputy chief of police.

Libman told the news reporters and editors that their access to public records is limited, especially to records that "injure the right of an individual to privacy."

EGGERS DESCRIBED the effects of the federal Freedom of Information Act, which was passed in 1966, and established procedures requiring federal agencies to disclose information to citizens.

The most-publicized aspect of the act is the requirement that the FBI and other agencies tell an inquiring citizen whether they have investigated him.

The act was a "revolutionary" piece of legislation, said Eggers, because it puts the "burden on government" to make its records public or to explain why it cannot make disclosures.

Hawaii's law is the exact opposite, said Sharpless: "you have to show why you should have access to the government information." The public and newsmen are required to go through "a legal thicket" to gain access to some public records, he said.

"As we are more interested in is not usually the information that would violate an individual's privacy," said Peter Hovenga, an Advertiser reporter.
Press vs. privacy:

no easy answers

By DAVID TONG
Advertiser Staff Writer

Does the press have the right to photograph a person in grief at the scene of an accident?

Does a judge have the power under the Constitution to order a press gag at a trial?

Do newspapers have the right to publish the criminal records of a person who has been arrested?

These vexing questions were discussed by a panel of attorneys and journalists at a meeting of the Honolulu Community Media Council yesterday.

Although there were no ready answers to these problems, the panelists appeared to favor the constitutional right protecting the right of speech over the right to privacy.

The panelists were Jon Van Dyke, a visiting law professor at the University of Hawaii Law School; Mike Middleworth, managing editor of The Honolulu Advertiser; Robert Kimura, former state legislator; and Stewart Chieft, news director for KITV. Stuart Gerry Brown, an American Studies professor at the University of Hawaii, was the moderator.

The question of a gag order of a trial was brought up by Van Dyke. He said the use of a gag order by a judge raises the constitutional problems of free speech for the defendant and the requirements of a fair trial.

Commenting on a Supreme Court decision in a Nebraska case, Van Dyke noted one possible problem that might occur when a defendant's right to have his side of his story presented to the public is hindered by a gag order that is applied to the defendant's lawyer — and not the defendant itself.

In the case of the articulate Angela Davis, for example, she could put forth her case quite well without the aid of an attorney, he said. However, an attorney or "a public relations spokesman" might be necessary for a less articulate person," he added.

Chieft, who covered the Charles Manson murder case for ABC, said there was a gag order in that case, but that it was violated regularly by reporters who acted on the assumption that it was all right to do "so long as no one was hurt." Chieft also defended the right to air so-called ambulance cases involving scenes of violence.

He said the standard he would apply in these cases is the interest of the majority of persons in seeing such violence.

"We have a burden to show real violence because we see so much fake violence on television," said Chieft, who noted that public criticism of the media for showing violence is similar to blaming the messenger for the message.

He also defended the right to print the criminal records of a person, because of the usefulness of such information to the society in passing legislation to curb crime.

Middleworth noted the concerns of The Advertiser in coverage of the public actions of private individuals and the private actions of prominent public figures.

He cited the case of Carl Fasi, 26-year-old son of the Mayor, who has been in the news because of a harassment charge a Star-Bulletin photographer has brought against him. That charge was dropped by the City Prosecutor's Office, but the Star-Bulletin has asked the City to reopen investigation of the charge.

Concerning news coverage of the incident, Middleworth said, "Do you identify him as the son of the Mayor . . . Personally, I wouldn't, if the person is an adult and living away from home."

On the other hand, he noted the rules The Advertiser follows in the coverage of public actions by private individuals. For example, he said, the paper would not cover a suicide of a person if it happened "in the privacy of his home." But he said the event would be considered news if he jumped off a building in sight of a crowd.

He also said it is the policy of his paper to withhold the names of persons who have been arrested until they are indicted and charged with a crime.

Middleworth said it is difficult to give "yes-no" answers in questions concerning the privacy rights.

"These are areas where what we do will be determined more by public opinion rather than the law," he said. "If we go too far out of line, the public will just quit buying newspapers."

Kimura, a candidate for U.S. attorney post, noted the harm publicity can do to the reputation of an innocent person who is innocently arrested and charged with a crime.

On the other hand, he said the media have been helpful in apprehending bank robbers and informing the public of wanted criminals.
The drivers' register

One aspect of American life that could use some Congressional attention is the ease with which careless and dangerous drivers are able to secure licenses in many states in spite of long records of violations and accidents.

Several years ago the Federal Department of Transportation set up a National Driver Register to prevent just such abuse.

Most states including Hawaii participate in the program. Thus when a driver's license is revoked in such a state, a report is made to the register. The agency serves as a clearing house, with its information available to all states.

THE PURPOSE is to prevent a driver from losing a license in one state, and then jumping to another and getting a new license without any difficulty. It is a big operation, because the agency receives reports of 6,000 suspensions or revocations each day, and process inquiries on 90,000 applications.

But the system does not work, and the reason is that too many states have failed to cooperate.

New York, California, Florida, and Puerto Rico are not full participants. Other states are not making full use of the service involved.

Thus it is possible for a person to hold two or three licenses, and rack up violations on all of them, yet never be called to account in the other states.

The problem grows more serious every year because many violators are constant repeaters. Accidents, property damage, and death are their stock in trade.

The Highway Users Federation estimates there are 10 million drivers without licenses or with invalid licenses of 129,000,000 drivers in the nation. A study of 197 fatal accidents in 1973 found that 32 of the drivers involved either had invalid licenses, or had at one time had licenses suspended or revoked.

ONE PROBLEM in enforcement is that many states cannot give information to the Register because of privacy laws. Thus two concepts of modern government — privacy and freedom of information — have come into conflict.

Hawaii's privacy law is so written that it does not prevent the passing of vital information to a Federal agency, so we are not bothered by that aspect.

Nor have the problems that bedevill some states apparently been particularly troublesome here. Honolulu's police, for example, are well pleased with the program.

Still there seems to be some information that is not being passed by some states, and that could hurt us in Hawaii as much as anyone else.

That's why it seems proper for Congress to take a hand.
Privacy Act to Severely Limit Data on College

Thu May 26 1977 SB M

The new Federal Privacy Act has a big impact on public colleges and universities because it limits the amount of information that can be released to news reporters and even parents.

The University of Hawaii at Manoa yesterday had a briefing for reporters to explain how the 1976 law will be implemented.

A parent or spouse who tries to find out the class schedule or grade average of a student will be out of luck, said Mary Lou MacPherson, a student affairs specialist.

The law forbids a university or college to give out personal information to reporters unless a waiver is signed by the student.

If no waiver is filed, all the University will tell about a student is his name, local address, telephone number, major field of study, and degree received, she said.

A student may withhold even that basic information by signing a form within 15 days of the start of school. This form allows the University only to confirm that a person is enrolled as a student.

Six students filed that form this semester; 43 the previous term.

An athlete may refuse to allow disclosure of his or her privacy, under the federal law. Only if a release waiver is filed can that information be disclosed, she said.

Sports readers will notice a paucity of information about college athletes who are unable to play because of poor grades, injury or disciplinary action.

MacPherson said the UIH cannot say that a specific athlete is ineligible because that would intrude on his or her privacy, under the federal law.

Students

Said career, noted sports information director Eddie Ihooya.

The law applies to all institutions of higher education which receive federal aid.
Grades Too Secret Under Privacy Law

By JONAS GERCKEN

A federal law protecting the privacy of college students is causing a lot of headaches for the University of Hawaii faculty.

The Family Educational Rights and Privacy Act, which became effective last Jan. 1, prohibits the release of "personally identifiable information" about a student, except to the individual student, those who "need to know," and anyone the student specifies in writing.

"Personally identifiable information" includes grades. Those prohibited from getting the information include a student's classmates.

THE PROBLEM: How to let a student know what grades he or she received on papers, exams, and so on at the end of a term — without anybody else finding out?

No longer can grades be announced, put on a wall or even returned to students in such a way that other students could get a peek at them.

Mary Lou McPherson, assistant dean of students at Manoa, last week reminded the faculty of the law and specified:

"Personal identifiers include the name of the student, the student's social security number, the student's Social Security number or unit number, or any other characteristic information which makes it possible to identify the student."

Under those prohibitions, no one may place graded papers with student names on the cover in the department office or on a table in the corridor.

GRADES CANNOT be posted anywhere if they go with "personal identifiers." That has about finished off the long-standing practice of posting class lists.

"Some departments are trying to use the last four digits of Social Security numbers," McPherson said. "But there is a chance of duplication that way. So far, nobody seems to have come up with a foolproof system."

A check with community colleges showed that there is no real problem complying with the act. Papers are returned by instructors to students personally and grades for the semester are mailed to home addresses.

Manoa's large classes, on the other hand, present problems not faced by community colleges, where the number of students participating in any one course is usually kept down.

Manoa's basic history classes on world civilization, for example, are given to hundreds of students at a time in the Varsity Theater.

Robert Locke, an associate professor of history, has more than 500 students in his class.

"While handling grades for examinations through teaching assistants who hand the paper to individual students, Locke said, "final grades are uncollected by Social Security number. "We don't see them after finals and there is no other way to handle it," he said.

"Total that posting grades is no longer allowed. Locke said that he will follow the rules, but added that "it's too bad because we do posting for the convenience of the students."

The law protecting student rights will now create a bit of inconvenience for them — students will have to wait until they receive their grades in the mail.

George Akita, another history professor with a large class, said that Social Security numbers are being used to post grades and "if we cannot do that, there will be a lot of trouble, students wanting to get information from the professor, or the teaching assistants."

With nearly 500 students in Akita's history class, each student wanting to get exam grades in private could create an impossible situation.

Chances are that until a practical solution is found, some students have a long wait coming.
Q — How much authority does the Department of Social Services have to investigate its clients? A friend told me they can check on bank deposits and withdrawals even without the person’s permission. Also, they can check with school authorities to see if your child goes to private school.

A — No way. It would invade the privacy of the individual. The recipient is brought into the act, but anyone who refuses to cooperate may be declared ineligible for benefits.

Here’s how an official of the State Department of Social Services and Housing explained it:

When a person applies for welfare, verified information is required to determine eligibility. The applicant may be asked for a savings passbook or to give permission for certain checks into his or her finances.

If a question arises after a person starts receiving assistance, investigators are required to inform the recipient they are looking into a matter.

“According to our manual, no investigation may be conducted secretly,” said the DSSH official.

Telling the recipient there is reason to believe he or she is attempting to withhold information, either fraudulently or innocently, gives the person a chance to clear up the matter. The recipient’s consent is requested to check into such things as employment, bank accounts and schooling.

If a person refuses to cooperate, he or she may be declared ineligible for benefits on the basis of an inability to substantiate or verify information.

State and federal regulations and statutes require investigation of possible fraud and require substantiation of information, explained the DSSH official.

A recipient who has done nothing wrong has nothing to worry about, she added. Also, any information gathered by DSSH stops there.

And contrary to what some people think, DSSH does not investigate everyone on public welfare.
Yee hits CAB disclosures

By SANDPA F. OSHIRO
Advertiser Staff Writer

State Sen. Wadsworth Yee yesterday called disclosures made by the Civil Aeronautics Board revealing his business dealings with Aloha Airlines president Kenneth C. Char an "invasion of privacy."

Yee was among those who had received checks from Char's personal account at Liberty Bank of Honolulu, an account which had been under investigation by the CAB.

Last week, the CAB released part of the records on the bank account after a Freedom of Information Act request from the Gannett News Service.

Thomas F. McBride, CAB director of enforcement, reportedly told the news service that the payments from Char's Liberty Bank account were not illegal because they involved personal, not corporate, payments to public officials.

Another account kept at First Hawaiian Bank, however, led to federal charges in July against Char and Aloha Airlines in connection with an illegal contribution made to U.S. Sen. Daniel Inouye's 1974 reelection campaign. Char pleaded no contest to the charge and was fined $1,000 by Judge Jack Yin Wong. The maximum fine was agreed upon by the government and defense attorneys.

Wong, too, was a recipient of checks from Char's Liberty Bank account. According to the CAB records, the Federal judge had noted before Char's sentencing that he once served as legal counsel for Aloha Airlines, but in November the judge further revealed that he and Char jointly own property in Haleiwa and that both are part of an investment house.

Wong indicated yesterday that he would not comment on the information recently made public by the CAB, although he had earlier denied that he had acted improperly in failing to disqualify himself in the Char case.

Checks disclosed last week include two totaling $110 which were made out to Wong with handwritten notes that read "AAL sh. 1,000" and "1,000 AAL sh" or "1,000 AAL sh" Char, who has continued to avoid any comments on the case, could not be reached yesterday to clarify the notes.

Other checks made out to Wong appeared to relate to dividend payments by Wong from the Mac's holdings in Pacific Resources, Inc.

Sen. Yee said checks made to him from the Liberty Bank account were for private investment.

"None were used for my campaigning, they were strictly for investment," Yee said.

Payments made by Char included a $7,000 check on May 29, 1974, which Yee said was a partial payment for the purchase of island property in Washington State. Another check for $5,800 was in final payment toward the purchase of an old cannery from the Maui Pine Co., according to Yee.

He also explained that a check for $3,725 dated Nov. 1, 1974, was in payment for a thousand shares in Aloha Airlines which Yee said to Char. He added that he offered the shares at the going market price and that there was nothing untoward about the deal.

"I certainly think it was an invasion of privacy for my part to have my personal investments publicized in this manner by the CAB," Yee said. "All my investments in whatever I have is reported before the State Ethics Commission and that is public record."

Another check disclosed last week was one made to three sons and one daughter of U.S. Sen. Hiram Fong. Fong said yesterday that the $3,300 check made in March 1974 was in connection with a local real estate investment. He did not elaborate on the transaction.

That check was reportedly deposited in the Liberty Bank account of Finance Factors Ltd., of which Fong is chairman of the board.

Fong also wrote a check to the "Friends of Fred Rohlfing" in 1974 amounting to $50. Rohlfing said yesterday that he appeared that the donation was made in payment toward re-creating a $49,000 debt that the unsuccessful congressional candidate had incurred in 1972.

Rohlfing said that while he did not have the records on hand, it appeared that such was the purpose of the check since the name of the group was used exclusively for that purpose.

Other checks were made to "Friends of Fong" ($250) and to the Republican Party of Hawaii ($100).
Attorney warns of new threat to free press, speech

By GERALD KATO
Advertiser Government Bureau

When the right of privacy clashes with the Constitution's First Amendment rights of free press and free speech, privacy must yield, an authority on the First Amendment said yesterday.

But the legal tide seems to be running in favor of privacy, said attorney Richard M. Schmidt Jr., general counsel for the American Society of Newspaper Editors (ASNE).

"The danger we face today is that legislative action at the national and state level under the flag of the right of privacy unless carefully drafted will allow a major segment of our American government, that part concerned with the operation of our criminal justice system, to operate under a cloak of secrecy," Schmidt told a luncheon gathering of journalists and attorneys.

The luncheon at the Oceania Floating Restaurant was cosponsored by The Advertiser and the Hawaii State Bar Association to review the state of First Amendment rights in the courts today.

Schmidt, a Washington, D.C., attorney, has been in Honolulu for an ASNE board meeting. He is regarded as an authority on communications law and the rights of a free press.

In his speech, Schmidt reviewed the "multitudinous problems" facing those who seek to preserve a free press.

"The problems of censorship, divulging sources, compulsory testimony, access, and privacy are all very much with us and will be for the foreseeable future," Schmidt said.

Schmidt said it was ironic that the privacy issue has come to the fore at a time when progress is being made with open records laws in the United States. One area of progress is the Federal Freedom of Information Act, he said.

But the same Congress that passed the Freedom of Information Act also passed acts related to privacy which may undermine the information laws, he said.

"Already we have examples of absurd bureaucratic interpretation of the privacy laws interfering with news gathering," he said.

"Examples are denial of names of students on honor rolls, the site and weight of high school athletic teams and the names of members of the marching band. A United States Attorney loa...l Thursday's prohibition from giving out any information other than the names of persons indicted for criminal violations. It was necessary to go to court to show him the error of his ways."

Schmidt traced the American heritage of press freedom back to this nation's infancy and noted then and now, people have been attempting to correlate a free press with a responsible press. The issue of press responsibility will continue to rage, Schmidt said.

"Whether it arises from the 'kill the messenger' syndrome that many hold, because of what they perceive to be press preoccupation with 'bad news' or whether it arises from calculated efforts to retaliate against the press by those who feel they have been its victims really does not matter.

"For all these forces will, by the simple device of utilizing the press itself to carry their message to the public, continue to call for imposition from the outside of press controls to ensure 'press responsibility.'"
News execs debate privacy of

KAAWAIAE, Hawaii — Newspaper executives from four western states debated the public’s right to know over individual privacy yesterday in a wide-ranging discussion that touched upon the murder of a reporter in Arizona and the recent resignation of Agricultural Secretary Earl Butz.

A Honolulu attorney asked if self-censorship might be worse than government controls.

Associated Press president Keith Fuller of New York said in his opinion the publication in a feature magazine of Butz’ racially-based joke was an invasion of the secretary’s privacy.

The question of when the right to know ends and privacy question begins drew diverse comments from the delegates to the annual conference of the Associated Press Association of California, Arizona, Hawaii and Nevada.

Waimea’s various press-government issues of the past several years were discussed in the two-hour panel presentation by four Honolulu figures and Mason Walsh of Phoenix, Ariz.

John Loder, director of journalism at University of Hawaii, said privacy is a growing issue for journalists to deal with. He said the hard question of when news becomes gossip — “when the public interest crosses over that line” — must be answered.

He said overstepping the line too often will result in a call for restrictions.

State Attorney General Ronald Amemiya said he was “incensed” by the reporting on the sex habits of President Nixon and his wife. Such a story, he claimed, “had no bearing on the public interest.”

Dan Rider, publisher of the Long Beach Independent, interjected that newspapers “are losing the public relations battle by going too far . . . (and) should use more restraint and better judgment.”

But Honolulu attorney David D. Dantzig asked of the self-censorship might not jeopardize the public’s right to know.

Walsh told the gathering he has forbidden reporters outside of Phoenix to interview staff reporters on the Phoenix newspaper in the aftermath of the murder of investigative reporter Don Bolles.

“We’re in a box in the thing,” he said, defending the decision to gag his own news men. He said he feared the outside reporters might jeopardize the investigation of Bolles’ slayer.

But panel member John A. Scott, publisher of the Frank E. Garvey Newspaper Foundation, asked if the decision by Walsh did amount to a “double standard.”

Walsh replied no, because a newspaper in a private business and not a tax-supported institution like the schools, courts and government.

Honolulu Advertiser editor in chief George Chaplin keynoted the two-day conference.

Chaplin, president of the American Society of Newspaper Editors, said newspapers must employ their talent, imagination and integrity to win the battle for public confidence.

“We may be the last hope for a sense of community,” he said after citing the Louis Tillman riot that showed a dereliction of confidence for all American institutions since 1966.

While newspapers suffered an 11 per cent drop, others plummeted by comparison.

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He said part of this is because of the rapid spread of technical and sociological changes and the fact the"press is on the cutting edge of this change."

Chaplin said newspapers should not fear television because even the industry leaders in television regard their news shows as more "headline service."

He said a poll conducted by the Hawaii Newspaper Agency showed 45 per cent confidence in Hawaii’s two daily newspapers. Responses showed the general public gave newspapers a 54 per cent confidence rating compared with a 44 per cent for television, and "community leaders" rated newspapers at 60 per cent compared with 10 per cent for television.

individuals

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individuals
A University of Hawaii astronomer, whose letters to and from friends in Russia were allegedly opened by the Central Intelligence Agency, today sued the U.S. government for $350,000 in compensatory damages.

An announcement of the suit on behalf of Dale Cruikshank, associate astronomer at the University Institute for Astronomy, was made at 3 p.m. today by the American Civil Liberties Union of Hawaii and Cruikshank's attorney, David Turk.

Liz Yonahara, executive director of the ACLU, said yesterday the CIA admitted agents had opened Cruikshank's mail on 19 occasions from 1968 to 1971.

The disclosure was made in a Dec. 18, 1975, letter sent to Cruikshank in answer to a request he made under the federal Freedom of Information Act.

YONAHARA SAID the intercepted letters included letters from Cruikshank to Russian scientists, letters from Russians to him and letters he sent to the United States while he was in Russia on two trips.

The damages asked represent $20,000 per letter.

The government agency "at no time had a warrant" and had no lawful authority to open, photograph and keep files on Cruikshank's mail, the suit says.

Cruikshank filed a claim for $340,000 damages in March to the U.S. Department of Justice, the U.S. Postal Service, the CIA and the FBI. The Justice Department denied his claim in a letter dated March 29, Yonahara said.

She said the court action is one of several suits being filed by the ACLU throughout the country on behalf of persons whose mail has been opened by federal agencies.
Amemiya Cites Changes in U.S. Statutes

Privacy, Information Laws Studied

FRI APR 30 1976 SB 84

By Gregg K. Kokesoko
Star-Bulletin Writer

State Atty. Gen. Ronald Amemiya yesterday said his office has begun an in-depth examination of Hawaii's laws governing privacy and access to government records because of changes in federal statutes.

"I imagine our laws are reasonable," he said, "when compared to those of other states.

"However, we plan to take a hard look at what our laws say and, it necessary, come up with suggestions to next year's Legislature."

Amemiya was referring to the U.S. Freedom of Information Act, which became law July 4, 1966, and the federal Privacy Act, enacted Sept. 37, 1974.

Amemiya, in a speech Wednesday to the Hawaii Police Association, pointed out that it could be interpreted that the fundamental concepts of the two laws are inconsistent.

"On one hand, agencies are supposed to provide free access to information," he explained and "on the other hand, agencies are supposed to prevent disclosure of information which would amount to an invasion of an individual's privacy.

Its primary purpose is "to enable Americans to have reasonable access to federal agency files and to establish a system whereby an individual can have agency material concerning him corrected."

Amemiya said, "The handwriting is already on the wall and that is why his office, like those in many other states, are now working on legislation patterned after the two federal laws.

"It's hard to say what the status of our laws are without the in-depth comparison," he added.
Privacy of Data

In the Feb. 18 edition of the Wall Street Journal, there was a report that American Express Co. now has a policy to immediately tell its credit card holders if their account records are subpoenaed by law-enforcement authorities or government agencies. The only exception would be where law-enforcement agencies tell the company that disclosures would obstruct the investigation of a suspected felony.

This kind of policy is long overdue to protect the rights of the individual, and it would be interesting to hear from local banks and other financial institutions as to their policy in this matter. At the same time, customers of financial institutions should pose this question to the institutions.

Going one stage further, it would seem appropriate for financial institutions and credit card users to communicate to their customers their policies on privacy of data, selling of mailing lists, and subpoenas.

Desmond J. Byrne
Open State Communications

Interdepartmental government correspondence, applications and communications would be open to public scrutiny under a measure (HB-3285) sponsored by Rep. Faith Evans, R-34th Dist. (Kaneohe-Maunawili).

"The bill would safeguard the public's right to know by deleting certain discretionary powers of the attorney general to withhold records from public inspection, unless such records would invade the right of privacy of an individual," Evans said.
Good Question

Electronic banking may be followed before long by electronic store checkouts that take us far down the road to a cashless society.

The obvious convenience of this makes it almost sure to come, but a few voices of caution are being raised. What is going to happen to personal privacy as we build nationwide computer information systems that may be interchangeable?

In Hawaii, a driver's Social Security number also becomes his Driver's License number. It is also the number on his payroll and dividend checks. Someday soon, Big Brother will be able to punch our Social Security number in a machine and find out all about us, including what we bought at the store yesterday.

While there's still time, we need to ask ourselves how far we want to go in this direction.
Does Interpol Threaten Your Privacy?

by Robert Walters

A novel of international intrigue, Interpol is an infallible, high-powered, worldwide police department whose agents roam the globe in search of master criminals. But to many veteran law officers who have dealt with Interpol, its headquarters in France, it is a slow-moving, archaic bureaucracy which seldom performs useful work.

Formally, the International Criminal Police Organization, known as Interpol, promotes cooperation and exchange of information among the police of its 170 member nations.

A senior law enforcement official in Washington contends that Interpol is really only "a sort of super telephone line." But a senator who has been investigating the agency fears Interpol could pose a threat to the privacy of innocent Americans.

Like most police departments, Interpol has been reluctant to discuss its work in public. But this year a subcommittee of the Senate Appropriations Committee opened what is believed to be this country's first major probe of the agency since it was formed following World War II.

The subcommittee held one day of hearings last spring, but its chairman, Sen. Joseph Montoya (D., N. Mex.), said there is much more to come. "We're particularly interested in seeing if the office in Washington was used for political purposes," he says. "We also need better guidelines governing the dissemination of information on American citizens to other countries."

An ally

Sharing that worry is Rep. Edward F. Bear (D., R.I.). He charges that Interpol "is a definite threat to the privacy and basic human rights of every man, woman and child in the United States," adding that both rights and liberties disappear. As members of Interpol, have access to files on American citizens.

Montoya declined to provide details about an alleged intrusion of politics on Interpol's work, but an independent investigation has produced evidence that among the high-ranking officials in Interpol's Washington office as recently as 1974 was a man who has virtually no prior law enforcement experience and who was placed in that sensitive post through a reference from Charles C. (Bob) Rebroc, the Florida businessman and banker, an intimate of then-President Nixon.

That disclosure contradicts the claims of Interpol officials, who have insisted that its United States "National Central Bureau" has operated under strict professional law enforcement standards.

Tortuous route

Those officials are reluctant to discuss the case of John Carlyle Herbert Bryant Jr., who came to Washington with 10 years' experience in selling cars and yachts in Virginia and Florida. Bryant's career with the federal government began with a $1-an-year job at the White House, as an assistant to Ronald E. Ziegler, then Nixon's press secretary.

After only nine months in that post, Bryant landed a $19,000-an-year job as a confidential assistant to the Interior Department's assistant secretary in charge of fish, wildlife and national parks. Less than two years later, Bryant's title there was changed to make him a "law enforcement specialist. Although he did a few police-type studies while at Interior, people in the department remember him, principally as a Rebroc protege.

Using references from Ziegler and Rebroc, Bryant moved in early 1973 to the Washington bureau of Interpol. "He was just a guy working in the office. His duties were very limited," says Louis B. Sams, who now runs that office. "He didn't perform the duties of an agent. What he did was not very important." But the record shows that Bryant was the third highest ranking official assigned to Interpol in this country and was earning a salary of more than $24,000 until he left in early 1974.

The history of Interpol is a checkered one. Its predecessor was the Internationa Criminal Police Commission, organized in 1923 with headquarters in Vienna. When Nazi forces occupied Austria in 1938, they took control of the agency and moved its headquarters to Berlin. Throughout World War II, there was virtualy no contact between ICPC and non-Nazi nations.

Then, in 1946, many of the former member countries established a new organization, with headquarters in the Paris suburb of Saint-Cloud.

The organization is a confederation of the national police agencies from 120 countries of all political and ideological persuasions, including two of the more independent countries within the Soviet bloc, Rumania and Yugoslavia. About 160 men and women from 18 of those nations work at Interpol headquarters, which has no authority to initiate investigations but serves instead as a central relay station and information bank for member nations.
About two-thirds of the headquarters employees are clerical workers who maintain an elaborate set of criminal files, including a mammoth index of more than a million cards, 200,000 reference folders, 100,000 fingerprint records, 20,000 dossiers on known criminals and a host of specialized files.

The remaining third of the employees at Interpol headquarters are professional law enforcement officers, but contrary to the portrayal in novels and movies, they do not travel around the world in pursuit of crooks. Instead, they coordinate the exchange of information about criminals, missing persons, stolen property, unidentified bodies and a variety of other items.

T-man in charge

The United States, like all member nations, has a "National Central Bureau" staffed by personnel from its own law enforcement agencies. Located in a suite of offices in the Treasury Department's headquarters in Washington, that operation is directed by Sims, who is on loan from the Secret Service.

The Federal Bureau of Investigation decided in the late 1950's that it did not want to act as the United States liaison agency, but in most other countries the national police organization—for example, the Royal Canadian Mounted Police in Canada and Scotland Yard in Britain—acts in that role.

The total United States budget for Interpol during the last fiscal year was almost $550,000, including $140,000 paid in annual dues. France, Germany, Great Britain and Italy each pay an identical amount, while other countries pay smaller dues scaled to their size and wealth.

No computers

Many United States law enforcement professionals are critical of Interpol on the grounds that it is too hidebound, rigid and formal. They also complain that it lacks any computer capability and therefore must hand-process all information, and that it poses security problems for those exchanging information.

During the first round of Senate hearings, Sims told Moniova that he checked "very closely" when he received an Interpol-related request from Romania or Yugoslavia, to determine whether those nations were serving as intermediaries for the Soviet Union, the People's Republic of China or another non-member Communist nation.

Sims insists that he has found no evidence of that practice, but an American law enforcement officer based in Western Europe, and who asked that he not be identified, disagree. "It's not just a hypothetical problem," he said, "I've been involved in cases where there was good reason to believe that political information was passed through Interpol and behind the Iron Curtain."
Other European-based agents cite different problems with Interpol. For example, the organization uses an antiquated Morse Code system to relay information to many countries, according to one source who said two or three weeks often elapsed between the issuance of an arrest warrant in one nation and the dissemination of that information to nearby countries. The International Association of Airport and Seaport Police, a competing group, last year denounced Interpol as "too big, too administration-minded, outdated and old-fashioned."

Another problem cited by some police officers who requested anonymity was that of "leaked" information. "If I'm dealing with Italian nationals smuggling German concert tickets into the United States, I'd far prefer to make contact with officers I trust in those countries," explained one American. "If I go through Interpol I have no way of knowing who else will find out about the investigation."

Montoya and others are concerned about improper "leaks" of another nature—the unauthorized dissemination of personal and political information about United States citizens neither accused nor suspected of criminal activity. For example, Interpol headquarters maintains files not only on known criminals but also on individuals "under suspicion" as well as complainants, victims and witnesses involved in criminal cases.

"Of current interest"

Similarly, the Washington bureau of Interpol has access to the Treasury Enforcement Communications System, which also contains information not only on convicted criminals and those facing formal charges but also on "suspected individuals . . . of current interest" to the Customs Service.

In addition, the TEC2 computer connects with the National Crime Information Center, the FBI's computerized data bank which has been criticized on the grounds that its arrest records do not always include the disposition of the case in instances where charges have been dismissed or rejected following court proceedings.

During Senate hearings earlier this year, Sims insisted that all Interpol affiliates confine their information exchanges to criminal matters. "They strive not to pass other types of material through . . . Interpol channels," he told Montoya.

But Montoya is still not satisfied because there are no formal guidelines, either Washington or France, governing the exchange of unverified accusations, raw intelligence data and other information potentially damaging to innocent citizens. "The overriding question here is about the role of secret institutions in a free, democratic society," he said in a recent interview. "Interpol is not a value in itself to be protected and fostered at whatever expense to such a society. It exists only to serve that society, and it does not do so if, in any way, it undercuts, threatens or ignores the rights of that society's citizens."
Privacy & press

WASHINGTON—As life becomes more complex and the world more threatening, the individual's right to privacy becomes more precious. There appears today to be a growing acceptance of a concept hailed more than 20 years ago.

ON THE MEDIA

Charles B. Seib

by Supreme Court Justice William O. Douglas: "The right to be let alone is indeed the beginning of all freedom."

Concern over this right is reflected in a new law—the Privacy Act of 1974—the basic provisions of which took effect yesterday. It curbs governmental invasions of privacy by restricting the collection, use and disclosure of personal information.

THE GROWING CONCERN for individual privacy is also being felt in the news business. There is the issue of what should happen when the public's right to know collides with the individual's right to be let alone?

Journalistic discussions of privacy customarily have centered on whether the press—electronic and print—is too protective toward its pats in public life, too reluctant to expose the boors and deal with the health or mental stability of public officials. Or, on the other hand, whether in its zeal to expose it denies public figures the basic privacy that is the right of every free person.

For example, was the press right in disclosing Rep. Wilbur Mills' misadventure at the Tidal Basin and the subsequent events that led to his hospitalization for alcoholism? The answer obviously is yes. Mills was one of the most powerful men in Washington, and it is now clear that his private excesses must have influenced the performance of his public duties.

But suppose a congressman of Mills' stature is known to have a mistress with whom he spends about as much of the people's time as some of his colleagues spend on the golf course, with no public notice there. Should the press report that breach of the prevailing mores?

Most news people would say no under a rule of thumbs that misconduct must clearly affect a public man's performance of his duties before it should be reported.

Public figures must accept the loss of a great deal of their privacy, that goes with acceptance of the spotlight. And they have ways of shielding him through the media if they feel they have been unfairly treated.

But what about the private citizen, the man or woman who doesn't seek or want publicity and who gets it only when he or she is involved in some matter of public interest.

CONSIDER THESE CASES:
The adult son of a community leader— not a public official—was arrested on serious drug charges. Should the father be identified in the press reports?

A man of minor prominence—again not an official—dies under circumstances which, if published, would cause great pain to his family. Should those circumstances, which had nothing to do with the cause of death, be published?

A citizen chases and wounds a bank robber. He asks that his identity not be revealed because he fears the robbers' accomplices, who are still at large. Should his name be published?

A woman is raped. She reports it to the police, and an arrest is made. Does she have the right to have her identity suppressed in the news stories?

ALL THOSE CASES occurred in the case of the community leader, the decision was to identify him because it added human and social elements to the story. In the case of the death under unusual circumstances, one of the newspapers of the community did not mention those circumstances in the obituary, the other did but printed them partially.

In the case of the citizen who wounded the robber, the name was not published. And most newspapers withheld the names of rape victims.

Editors are faced with questions like these almost every day. And in every case they must weigh the public's right to know against the individual's right to be let alone.

Most editors will admit that there are other considerations, conscious or subconscious: a traditional belief that the truth is always publishable, a competitive urge to be first with the news, a very human—and professional—appetite for gossip.

IN 1899, two young lawyers wrote an article which laid the foundation for the present legal approach to the privacy question. Samuel D. Warren and Louis D. Brandeis, who later became a distinguished Supreme Court justice, saw a threat to personal privacy in the then-new mass circulation newspapers.

They said the press was going beyond the bounds of propriety and decency and then stated what might be called a philosophical basis for a respect for individual privacy:

"The intensity and complexity of life, attended upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual..."

Perhaps the phrasing is too elegant for our staccato times, but the message rings true 85 years later.
The unwritten right

BY RICHARD L. WORSNOP

Editorial Research Reports

It may be too late to cut Big Brother completely down to size, but a modest step in that direction will be taken tomorrow. That is the effective date of the Privacy Act of 1974, a law designed to protect citizens from invasions of privacy by the Federal government. To this end, it permits individuals for the first time to inspect information about themselves contained in agency files and to challenge, correct or amend the material.

Most Americans would hardly know where to begin. A four-year study completed in June 1974 by the Senate Judiciary Subcommittee on Constitutional Rights found 158 data banks with more than 1.2 billion records in 54 Federal agencies. These data banks, the study noted, "are by no means all of the government files on individuals. Rather, they are the systems which the 54 agencies polled by the subcommittee were willing to admit they maintained."

ADDITIONAL SYSTEMS should come to light after tomorrow, for the Privacy Act requires Federal agencies to disclose the existence of all data banks and files they maintain on individual citizens. But much is exempted from the disclosure requirement: records maintained by the CIA and by law enforcement agencies; Secret Service records; statistical information; names of persons providing material used for determining the qualifications of an individual for Federal government service; Federal testing material and National Archives historical records.

The U.S. Constitution makes no specific reference to a right to privacy. Nevertheless, a number of amendments to the Constitution, as embodied in the Bill of Rights, protect various aspects of individual privacy. The First Amendment stipulates that "Congress shall make no law ... abridging the freedoms of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Moreover, the Fourth Amendment affirms "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures ... " There was relatively little concern with the privacy issue until the late 19th Century, when "force technological developments ... altered the balance between personal expression and third-party surveillance which had prevailed since antiquity," wrote Alan F. Westin in his book, "Privacy and Freedom." He singled out the telephone, the microphone and dictograph recorder, and "instantaneous photography."

"THE ADVENT of high-speed computers, with their awesome capacity for storing and retrieving data of all kinds, posed a still greater threat to individual privacy. "Bureaucratic inefficiency was a partial guarantor of our privacy," Ohio State Sen. Stanley J. Aronoff commented. "The computer has changed that."

FRI SEP 26 1975 AD H:

Computer technology also has made it more difficult to distinguish between the legitimate needs of government and private agencies for information on an individual and the right of the individual to keep the information private. In most cases, moreover, the individual is unaware of what information about him is on file, and where. The Privacy Act of 1974 set out the only way toward solving this problem and reaffirming what Supreme Court Justice Louis Brandeis once called the "right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men."
Ford vows to protect people’s right to privacy

MON SEP 22 1975

STANFORD, Calif. (UPI) — President Ford pledged yesterday to “protect every individual from excessive and unnecessary intrusion by a Big Brother bureaucracy.” He said social legislation has made the Federal Government the worst offender.

In an address prepared for dedication ceremonies at Stanford University Law School, Ford said there have been “threats to privacy” as the result of laws that “past Congresses enacted for laudable purposes having wide public approval.”

“Many of these laws with today’s technology cumulatively threaten to strip the individual of privacy and reduce him to a faceless set of digits in a monstrous network of computers. He not only has no control over this process but often has no knowledge of its existence,” he said.

Ford said he learned as chairman of the Domestic Council Committee on the Right of Privacy that “one of the worst offenders is the Federal Government itself.”

Ford blamed these incursions on the expansion of governmental social programs. He said those programs “established a direct link between the citizens and the bureaucracy,” making “government logically interested not only in monitoring criminal behavior but also a lot of other things about its citizens’ lives and habits.”
Drawing the Line

The informer is not one of the admired figures in our culture, but he is essential to law enforcement. From the city police department to the U.S. Customs Service, law enforcement agencies find informers invaluable. It would be impractical to abolish their use.

But the practice has spread beyond investigations of criminal violations. Information has been gathered regarding sexual activities and other matters besides crime. Political groups have been infiltrated, spies upon and harassed.

The FBI, for instance, collected information about the sex life of the late Martin Luther King Jr., and offered the material to newsmen. The FBI recently admitted that for 10 years it conducted a campaign to disrupt the radical, but legal, Socialist Workers Party — including the use of anonymous letters intended to damage the reputations of party members.

In view of these and many other disclosures, it is difficult to take FBI Director Clarence M. Kelley seriously when he says, as he did in the April FBI Law Enforcement Bulletin: "Where privacy is concerned, I am confident there is no group more genuinely committed to its preservation than law enforcement personnel. Over the years, no others have had in their possession more potentially damaging information about fellow citizens and few, if any, others have guarded such privileged data more carefully."

Kelley goes on to assert that "privacy must not become a refuge for crime," to which we would reply that police agencies must not be permitted to use the war against crime as an excuse for violating the Constitution.

Just how far this sort of thing can go is illustrated by the case of Lori Paton, a 16-year-old high school student who wrote a letter to the Socialist Workers Party as part of a school project. As a result, the FBI admitted to a court, it kept a "subversive" file on her and actually conducted an investigation of her...

When police agencies infringe so flagrantly on political activity, it is past time to blow the whistle. If some sort of investigation or infiltration of a political group is desired, the police agency should be required to show, perhaps to a judge, that there is reasonable cause to believe that crimes have been committed — much as a warrant is required to enter a home, or permission is needed to tap a telephone.

In addition, police agencies must not be permitted to collect and preserve information that is not directly relevant to violations of the law. To do otherwise is to permit blackmail. The late J. Edgar Hoover was the most feared man in Washington because of the incriminating material about public figures in his files.

The ordeal of bied... resulted in numerous infractions of civil liberties that, eliminated in the Watergate break-in. Now we must make a fresh effort to distinguish between what tactics are acceptable in police work and what are unacceptable.

This does not mean giving up investigations, or file-keeping, or even mean giving up the use of informers. It does mean drawing a line that a free, democratic society can accept.
What privacy for public figures?

By GODFREY SPERLING JR.
Christian Science Monitor Service

WASHINGTON — The post-Watergate emphasis on public morality, together with the Wilbur Mills affair, has made a social-hour conversations piece of this question: Has the public the right to know about the private peccadilloes of public figures?

The question is prompted in great part by the widely accepted assumption that Washington is a swinging town with numerous public figures drinking and behaving immorally — some outside the public eye and some blatantly in the open.

A VETERAN OBSERVER of Washington's mores, bureau chief Peter Lisagor of the Chicago Daily News, accepts the thesis that this kind of personal behavior is indeed prevalent in Washington — but he takes some exception to the question.

"The premise of the question," he says, "is that Washington is a Sodom and Gomorrah, a den of iniquity, a city of sin — and it simply isn't true. This is a square town, a 10 o'clock town. The womanizing and drinking go on. But it is much worse in cities like Chicago, New York, Dallas — in any city where the corporate structure prevails. This city is getting a bad rap."

But Lisagor agrees that public servants bear special watching, and he takes the position that there are times when public officials' private acts should be reported: "I say his private life should be inviolable whenever what the person does interferes with his public life."

This Lisagor-expressed standard is generally accepted doctrine here. But Des Moines Register bureau chief Clark Mollenhoff underscores the difficulty in applying this standard:

"THE PROBLEM," he says, "is in interpreting which acts relate to the official life and which are clearly part of the private life. It is a matter of judgment. It is inevitable that what one does in private life has an effect on his public life. The question is whether it has a harmful influence on the public life."

Several newsmen say the press should not sensationalize. Several also caution in this vein: "We have to be extremely careful with this kind of story. We must lean over backward to make certain our facts are right. We certainly shouldn't hurt anyone."

How about the question of "protecting" public figures by not printing stories that should be printed? Says Lisagor: "Now there are reporters who are easy with public officials and protect them when the public really should be hearing about their private acts. But, on the whole, these things do get reported in this town."

EILEEN SHANAHAN of the New York Times takes the position that all private acts of public officials should be subject to publication. "My own view," she says, "is as long as we pretend to tell a lot about the personal lives of public officials — about their wives, children, golf scores, etc. — we are committing a fraud if we don't also print the things they don't want known about themselves — even when these things don't affect their work."

Robert Boyd, bureau chief here of Knight Newspapers, puts the problem in perspective. "This is one of the classic cases," he says, "of two good principles in conflict: the need for information and the people's right to know as against the person's right of privacy."

TUE APR 1 1975 AP 1

Courts for years now have been ruling that public figures such as athletes, entertainers, and politicians give up much of their right to privacy when they decide to live in the spotlight of public attention.

ALSO, since the Supreme Court ruling in the New York Times vs. Sullivan case a few years back it is clear that a newspaper has little to fear about committing libel against a public figure. So hardly anything would seem to deter newsmen and newspapers from reporting on the private peccadilloes of public officials.

Several newsmen see new attitudes taking over on the privacy-and-the-press question. Their assessment:

In the post-Watergate climate it will be much more difficult for public figures to "get away" with committing acts that harm their public performance. The press will be much more diligent in reporting such acts.

And the public will be much quicker to discipline those politicians whose private acts are impairing their ability to do the job they were elected to do.
April 8, 1987

Robert Alm  
Director  
Dept. of Commerce and Consumer Affairs  
1010 Richards St  
Honolulu, HI 96813

Dear Robbie,

I'm enclosing a few articles which have useful background on the privacy/freedom of information issue. You might look them over and decide whether they would help committee members get a sense of the scope of the problem.

Ian Lind
Chapter 12

The State Role in Privacy Protection

Naming the new nation the “United States of America” reflected the founders’ commitment to the Federal Principle, the division of power between the States and the national government. From the beginning, each State was, and still is, a sovereign authority, with power to perform within its borders almost all of the activities, legislative, executive, and judicial, that the Federal government performs, except to represent itself in foreign affairs, burden interstate commerce, and provide for the national defense. It can and does tax its citizens, provide services, regulate commerce, license professions, and exercise police powers. Indeed, the national government was intended to be the government of limited, delegated powers, with the States exercising domestically, any of the powers one might expect a government to use. That was the theory, though in practice the pendulum has gradually swung so that the Federal government is now the forum where the great domestic policy issues, social as well as economic, are resolved. The States’ role is still important, and shows signs of growing, but currently is the more limited one. The State still functions as a basic provider of government services, but in many cases is simply carrying out programs that originate at the national level and are funded, at least in part, by the Federal government. Even in the sectors it controls, for example, police protection, Federal statutory programs carried out by agencies like the Law Enforcement Assistance Administration (LEAA) are beginning to make inroads on its authority. The States are still the governmental vehicle for determining land use and allocation of most of the natural resources within their borders; though, once again, the Federal government has begun to take a prominent role in order to assure environmental quality and effect national resource policies. Population growth, urbanization, mobility, and economic integration have turned many of the social and economic problems that could once be managed at the local level into problems that require national attention. Thus, the Federal government, of necessity, now dominates many areas that were traditionally State preserves.

The role of State governments in protecting personal privacy is, however, still enormously important. The records a State government keeps about the individuals under its jurisdiction are often as extensive as those kept on the same individuals by the Federal government, and in some respects even more so. As a prelude to the following chapters which consider various aspects of the relationship between the individual and agencies of the Federal government, this chapter briefly summarizes how the Federal-
State relationship enters into the Commission's recommended program for protecting personal privacy. Four aspects of that relationship are important to the national policy the Commission proposes:

- How the Federal government constrains State activities;
- How States have tried to protect personal privacy;
- How State record-keeping practices affect personal privacy; and
- How the Commission's recommendations fit into the existing system for implementing national policy at the State level.

**FEDERAL CONSTRAINTS ON STATE ACTIVITIES**

The Federal government may restrict State action or take action itself affecting apparently intrastate activity on the basis of four Constitutional provisions: the commerce clause, the spending clause, the Fourteenth Amendment, and the welfare clause. The commerce clause enables the Federal government to regulate interstate commerce by precluding certain State regulation. In legislating under the commerce clause, however, the Congress sometimes explicitly leaves existing State regulation intact, or provides that States may also regulate, so long as State regulation does not conflict with existing Federal law. For example, Federal and State Fair Credit Reporting Acts and the existing banking system provide for dual regulatory structures in those areas. In fact, only in limited areas such as trademark and copyright law has the Federal government prohibited the States from acting. Congress has also used the commerce clause, alone or in conjunction with the Fourteenth Amendment, as its authority for enacting some laws that are basically social legislation, for example, the Equal Credit Opportunity Act, the Civil Rights Act of 1964, and the Equal Employment Opportunity Act.

The Fourteenth Amendment, mainly through its equal protection clause, enables the Congress to limit State regulation in areas of social policy, but it is the combination of the welfare and spending clauses that gives the Congress most of its power to affect social issues and limit State action that affects them. Federal programs predicated on the spending power can either restrict or require State action, or both. The Medicaid program, for example, requires the States to maintain certain records about individuals and restricts the disclosure of that information. The constraints of these programs are not mandatory on the States, as commerce clause and Fourteenth Amendment legislation is, but since they require State compliance as a condition of receiving Federal program funds, the effect may be about the same. They are, moreover, the only way that the Federal government can affect the internal management and functioning of a State government where there is no Fourteenth Amendment interest. While the Fourteenth Amendment enables the Federal government to forbid the States to discriminate improperly against individuals, or to deprive them of their Constitutional rights, neither the Fourteenth Amendment nor the commerce clause would seem to enable the Federal government to regulate State activities that are essential to the performance of internal governmental functions, such as record keeping. As recently as 1976, the U.S. Supreme Court ruled in National League of Cities v. Usery that the Federal government may not legislate in ways that "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." The national government, in other words, may not use coercion to influence, for example, State government record-keeping practices, but the National League of Cities decision does not preclude the use of inducements, such as making certain record-keeping practices a condition of Federal funding.

**STATE PROTECTIONS FOR PERSONAL PRIVACY**

Within the strictures the Federal government imposes on public and private-sector record-keeping practices, some States have strengthened the federally prescribed protections. California, for example, includes in its State Constitution a specific protection for the "inalienable right" to personal privacy. The California guarantee goes beyond traditional limitations or government surveillance and government access to information to include protections for the records about individuals maintained by private and public entities. The California legislature has followed court interpretations of the State Constitutional provisions and, in specific areas of record keeping, has enacted statutes that prescribe procedures whereby an individual can exercise his right to participate in a record keeper's decision to disclose information about him.

In response to the invitation in the Federal Fair Credit Reporting Act, a number of States have passed their own credit-reporting laws, and some go considerably beyond the strictures of the Federal law, but there is little consistency among State laws to protect records maintained about individuals, in either the scope or the degree of protection provided, and few States give adequate minimal protection.

The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal government have taken full advantage of each other's experimentation. Altogether, the Commission's inquiry into State record-keeping practices forces it to conclude that an individual today cannot rely on State government to protect his interests in the records and record-keeping practices of either State agencies or private entities.

This is not true, of course, of all States. Some of them approach the protection of the individual's interests in State records and record keeping in as comprehensive a way as has the Federal government. Seven States have enacted omnibus statutes similar to the Privacy Act of 1974 to regulate the collection, maintenance, use, and disclosure of State agency records. The Constitutions of four States provide a right to privacy that includes a record keeper's corresponding duty to keep certain records confidential. Several

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2 An overview of State efforts and a comprehensive list of State legislation affecting the rights of individuals in records and record-keeping practices will be published separately as an appendix volume to this report.
States regulate the employment and personnel record-keeping practices of their State agencies. Almost every State has some kind of freedom of information or public records law opening State government records to public inspection. The States diverge widely, however, in their determinations of which records belong in the category of public records. Some exempt from disclosure specific categories of records, such as tax and adoption records; others exempt records that are required or permitted by any other statute to be withheld; and still others adopt the Federal standard and prohibit disclosure of information in government records if disclosure would constitute an unwarranted invasion of personal privacy. A few exempt any records if their disclosure would result in a denial of Federal funds, a provision that brings into focus the far-reaching effect of linking privacy protection requirements to the receipt of Federal funding.

Whatever a State may or may not elect to do about its own record-keeping practices, requirements to collect or protect information, or both, flow with Federal money and often supersede whatever State arrangements exist. On another level, the constraints thus placed on State activity frequently require private organizations to alter their record-keeping practices. The information collection criteria established by portions of the Medicaid program, for example, require State agencies to collect and retain information which they gather from private organizations, which, in turn, may very well have to keep certain records, or keep records in certain ways that they would not otherwise do.

**State Record-Keeping Practices**

The Commission looked at the State's role in protecting personal privacy from two perspectives: the State government as record keeper, and the State as regulator of the record-keeping practices of private organizations. In selecting State public-sector record-keeping relationships to examine, the Commission concentrated on areas in which the Federal government exercises substantial responsibility, and thus looked primarily at the State role as an implementor of national policy. As noted above, the Commission is also aware of the Constitutional limits on the power of the Federal government to regulate the activities of State government that are essential to the performance of internal governmental functions, such as record keeping. For these reasons, most of the recommended measures that directly affect State record-keeping practices can be implemented as a condition of Federal funding under various programs.

The Commission emphatically does not recommend wholesale application by the Federal government of the Privacy Act of 1974 to State and local government record keeping. The Commission believes that the States' creative work in devising privacy protections for the individual in his relationships with State government should continue. Indeed, the Commission believes that the fair information practice statutes or executive orders of the several States that have them constitute one good approach to resolving the privacy protection problems raised by a State's own record-keeping practices. The recommendations advanced in Chapter 9 of this report regarding government access to records about individuals maintained by private organizations, the recommendations in Chapters 10 and 11, on education and on public assistance and social services record keeping, and the analysis of record-keeping practices and requirements associated with various aspects of the citizen-government relationship in Chapters 13 through 15, should help to guide the States in determining the type, degree, and mode of protections they will provide the individual in their own record-keeping operations.

Furthermore, while the Federal government has placed certain privacy protection requirements on States as a condition of receiving Federal funding, the cut-off of funds is an extreme and rarely effective enforcement technique. Hence, implementing such minimum protections by State law can have two advantages. A State can extend its requirements to the State agencies and organizations that do not receive Federal funds or benefits; and, it can use more flexible enforcement mechanisms and incentives for compliance than termination of Federal benefits. Depriving a State agency of Federal funds, for example, does not help an individual whose rights have been violated, and it harms other individuals. It is seldom an effective incentive for compliance since the sanction is so drastic that the threat of it lacks credibility, especially if the program is a large one where cutting off Federal funds would penalize a great many blameless individuals. By contrast, a State statute can create the alternative of allowing aggrieved individuals to seek redress and remedy against States in State courts, and can provide administrative or criminal sanctions for remiss State employees without disrupting the entire program.

**THE STATE ROLE IN A NATIONAL POLICY**

In formulating its recommendations, the Commission has recognized and encouraged the existing role of the States in providing individuals with the ability to protect their own interests. In areas such as insurance and medical care, for example, the Commission suggests that the States retain their current power to regulate in conjunction with the creation or extension of a Federal role. Indeed, the significant increase in State regulatory efforts to protect the interests of the individual in records kept about him, noted above, has already led a number of States to try out innovative protections, particularly in their regulation of private-sector organizations. Of the four States that extend Constitutional privacy protections to records about individuals, all apply these same restrictions to their local governments, and two apply them to private organizations as well. Eleven States have gone beyond the protection required by the Federal Fair Credit Reporting Act and enacted Fair Credit Reporting statutes to legislate somewhat stricter requirements. A number of States restrict the disclosure of bank records and define the confidentiality an individual has a right to expect, a right not currently recognized in Federal law for either credit or depository relationships. A number of States have enacted statutes regulating the disclosure of medical records about individuals, many using their licensing
power to enforce this standard of confidentiality. A number of States recognize a patient’s right of access to medical records about him.

The Commission takes no single position on the general role of State governments in regulating record-keeping practices. It suggests a role for State agencies in most of the areas it has examined, but always in the context of the current division of regulatory responsibility between the Federal government and the States. The recommended measures create no new authority to regulate the record keeping of organizations that are not now subject to State regulation, nor do they deprive a State of regulatory authority it now has.

Consider, for example, the recommendations regarding credit and depository institutions. The authority to regulate financial institutions is shared between Federal and State governments, and the Federal government has not preempted State regulation. Nonetheless, the recommended measures recognize the ability to preempt certain State regulation and therefore rely on Federal statutes and enforcement mechanisms. Yet, beyond setting basic protection requirements, the recommendations do not limit existing State authority. The States would remain free to provide additional legal protections for the interest of an individual in the records about him maintained by financial institutions.

Or consider the reverse. Regulation of insurance is traditionally the province of the States where the Federal government does not act. As Chapter 5 points out, however, the States have not provided adequate protection for the interests of the individual in the records insurers maintain about him. Thus, the Commission recommends Federal statutes to establish certain basic rights of access and correction, but these protections depend on the individual to assert the rights the Federal statutes would give him, and on State regulatory agencies as well as Federal agencies where the States do not act to provide oversight of insurance company compliance. The State role is defined in several recommendations. The Commission recommends that States amend their unfair trade practices acts, so that they can establish and enforce the recommended notification requirements. The Commission also recommends that State governmental mechanisms receive complaints regarding the propriety of information collected by insurance companies and bring them before policy-making bodies that have the authority to address them, or if the existing entity already has such authority, to consider such propriety questions itself.

In the record-keeping relationships that directly involve State agencies, the Commission recommends that protections for the individual be required as a condition for the receipt of Federal assistance. These areas are: public assistance and social services, education, research and statistical activities, and the confidentiality and use of Federal tax returns. In each of these areas, the extent to which the Commission’s recommendations must be implemented will depend upon the degree to which the State’s agencies participate in the relevant Federal programs. In two of these five areas, moreover—public assistance and social services, and the confidentiality of Federal income tax data—the Commission recommends that States be required to enact prescribed statutes establishing protections for personal privacy. In both cases, the State agencies themselves are the primary recipients of either money or information from the Federal government, and also, most States have supervisory responsibility for much of the activity conducted by their county and city governments. In public assistance and social services, the Commission further recommends that each State enact a statute that would also apply to public assistance and social service programs in the State that do not receive Federal assistance, although it does not recommend or suggest that the enactment of a statute of that scope be a Federal requirement.

The medical-care area is something of a special case because the State’s major role is to reimburse Medicaid expenses. It is not usually a primary medical-care provider, nor is it involved in the flow of Federal assistance to individuals through the Medicare program where most of the direct Federal requirements on medical-care providers are imposed through the process of qualifying for Medicare participation. Nonetheless, the Commission still recommends that States enact their own statutes incorporating the protections for medical records recommended by the Commission so that individuals will not have to rely on the Federal government to enforce the rights the recommended measures would establish and so that the recommended rights and obligations can be extended to public and private medical-care providers who do not need to qualify for Medicare or Medicaid participation.

In research and statistical activities, Federal assistance usually flows directly to the performing institution through discretionary grants and contracts. The only State agencies that receive an appreciable amount of Federal funding for research and statistical activities are State universities. Chapter 15 presents guidelines for the protection of personal privacy which the Commission recommends as a basis for the research and statistical activities conducted by State agencies or with State assistance.

The Commission’s major departure from the general policy of relying on the State to implement Federal requirements is in education. There the Commission does not recommend a State role. Several factors influenced this decision. First, Federal regulation of record-keeping practices under the Family Educational Rights and Privacy Act (FERPA) does not require an implementing State law, mainly because most Federal funds flow directly to local school districts or to universities. The recommended measures strengthen FERPA protections but do not alter that process. Second, the Federal law is comprehensive, and since almost every public and private educational institution currently receives Federal assistance, State law would not extend the law’s coverage appreciably. Third, although there are State educational codes for public elementary and secondary schools, those schools have a strong tradition of local autonomy.

Nonetheless, nothing in current FERPA provisions or in the Commission’s recommendations prevents a State from enacting its own legislation as long as the Federal requirements are met. Indeed, California, for one, has already done so, and the protections prescribed by California law are stricter than FERPA’s. But while State law may be needed to provide civil remedies for individuals whose rights with respect to education records are violated,
the Commission prefers to stress local accountability in education as in the other areas. The recommended provisions of recourse to a Federal court which could enjoin the institution to respect the individual's FERPA rights should provide a vehicle for redress of grievances, if and when a governing board fails to see that an educational institution discharges its obligations to an individual.

It should be noted that in all of these areas, in addition to keeping the privacy protections required of State agencies to the minimum, most of the recommended measures leave the primary responsibility for enforcement with the States, seeking to strengthen the accountability of State agencies to their State legislatures and courts rather than making them more accountable to the Federal government. Concomitantly, the recommended measures restrict the Federal role to first reviewing and approving the required State law or policy, and then to receiving complaints about State enforcement efforts. Moreover, the Commission relies wherever possible on existing mechanisms to monitor performance: in medicine, the Joint Commission on Accreditation of Hospitals and State licensing agencies; in research and statistical activities, institutional review boards; in public assistance and social services, appropriate State agencies; and in education, elected boards and institutional governing boards.

In the matter of Federal sanctions, the Commission concluded that a Federal agency should have some alternative sanctions short of cutting off all Federal funds when a State or private agency is in violation. These alternatives might include withholding or asking for the return of a proportion of benefits, graduated according to the seriousness of the violation. In categorical grant programs a percentage of the total grant could be withdrawn as a penalty or withheld as security for specific performance of obligations. In reimbursement programs, moneys could be withheld on a similar basis. To give the Federal agency graduated alternatives would make the threat of sanction credible, which in turn would increase the State's incentive to maintain compliance.

Finally, in a sixth area, employment and personnel, five of the Commission's recommendations specifically affect State employment and personnel record-keeping practices. These recommendations (Recommendations (6), (7), (8), (9) and (10) in Chapter 6), deal with the use of arrest records in employment. Recommendations (6), (7) and (8) invite State legislatures to restrict State use of arrest records in determining eligibility for employment and licensing. Recommendation (9) further expresses the Commission's deep mistrust of the use of arrest records in employment by recommending Federal financial assistance to States to help them devise means of limiting inappropriate arrest disclosures to employers by State and local law enforcement agencies, and to improve the accuracy and timeliness of arrest records.

As noted earlier, the Commission does not recommend that State governments be required to adopt a particular omnibus privacy protection statute to regulate their agencies' record keeping. The Privacy Act, however, recognizes that the Federal government owes the States assistance in developing appropriate legislation. In fact, the Privacy Act authorized the Commission to provide technical assistance in the preparation and implementation of such legislation. The Commission sees a clear need for continued assistance of this kind, and includes suggestions to this effect in the chapters on medical records, education, and public assistance, and also in the implementation discussion in Chapter 1.

With respect to records maintained or regulated by State agencies, the Commission also makes two quite specific recommendations: (1) that States amend their penal codes to provide criminal penalties for getting information from a medical-care provider through deception or misrepresentation; and (2) that each State review all direct-mail marketing and solicitation uses made of State records about individuals. This is especially important when State agencies prepare mailing lists for the express purpose of publishing, selling, or exchanging them, as motor vehicle departments often do without apprising drivers and owners of registered vehicles that they do so. The Commission recommends that State agencies be directed to develop a procedure whereby an individual can notify the agency and, through the agency, any user of the record for direct mail marketing or solicitation that he does not want his name disclosed for such a purpose.

**STATE AGENCY ACCESS TO THIRD-PARTY RECORDS**

For many of the record-keeping relationships examined in this report, the Commission recommends constraining the voluntary disclosure of records about an individual by private-sector record keepers. Individually identifiable credit, depository, and insurance records may not be disclosed without the authority of the individual to whom they pertain or the presentation of valid compulsory legal process. This would include disclosures to State and local government agencies. There are exceptions, of course, where valid legal process is served on the record keeper or where the record keeper is subject to statutory reporting requirements. With respect to the use of Federal tax return information, the recommended measures also prohibit any disclosure by one State agency to another for nontax purposes. With respect to federally assisted research or statistical projects, no recorded information may be disclosed in individually identifiable form for any purpose other than a research or statistical purpose or the purpose of auditing a grant or contract.

To the extent that these restrictions affect State agencies, they place few specific limitations on State use of compulsory legal process or even on State reporting requirements. The limitations on Federal compulsory processes and Federal reporting statutes recommended in Chapter 9, however, provide a model for the States. Indeed, as noted at several points in that chapter, the broad public policy and specific recommendations it presents are equally applicable to State and local governments. The recommendations were not explicitly directed to the States because of the difficulties of dealing properly with fine, but often crucial, distinctions in the forms of compulsory legal process in 50 jurisdictions.
Chapter 13

The Relationship Between
Citizen and Government:
The Privacy Act of 1974

The Privacy Protection Study Commission was given the broad mandate to investigate the personal-data record-keeping practices of governmental, regional, and private organizations and to recommend to the President and the Congress the extent, if any, to which the principles and requirements of the Act should be applied to them. Early in its inquiry, the Commission decided that to fulfill this mandate an assessment of the Privacy Act itself, its underlying philosophy, and the experience of Federal agencies to date in complying with it would be necessary. This chapter reports the results of that assessment. In so doing, it responds to the Commission’s mandate directing it to:

report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information. [Section 5(b)(2) of Public Law 93-579]

As the preceding chapters demonstrate, the Commission has concluded that the Privacy Act should not be extended in its present form to organizations outside the Federal government. This conclusion is based on several considerations. First, economic incentives can be used to induce organizations in the private sector to limit their acquisition and retention of information about individuals much more easily than they can be used in government. Private-sector organizations can be moved to protect their customers’ privacy interests if their customers know and understand their record-keeping practices and use the competition of the marketplace as an ally in securing compliance with privacy protection safeguards. In addition, a private-sector organization’s legal liability for violation of certain individual rights compels attention to fair practices and procedures in carrying out privacy protection safeguards even at the lowest levels. A mistake that costs a company money can cost the responsible employee his job. In government organizations, however, such incentives are much more tenuous, as the discussion later in this chapter will indicate.

A second consideration that argues for distinguishing private organizations from governmental ones is the high degree of uniformity, particular-

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1 Section 5(b)(1) of Public Law 93-579.
ly of Federal government administrative processes and practices, in contrast to the diversity of similar practices found at other levels of government and throughout the private sector. The standards of government operation outlined in the Administrative Procedures Act (5 U.S.C. 551 et seq.) apply to all but the most limited of Federal agency activities. No parallel exists in the private sector.

The third consideration that led the Commission to reject wholesale, uniform application of the Privacy Act to other than Federal government agencies is related to the second; uniform and specific Federal requirements imposed on all private-sector record keepers and other governmental ones would inevitably require broad-based regulation, giving government an unprecedented role in channeling and monitoring flows of information throughout all of society. While the Commission recognizes that government intervention in some areas of record keeping may not be avoidable, it strongly believes that the safeguards for personal privacy it seeks to establish and preserve require and, in fact, demand that such intervention be limited and controlled.

A fourth reason for concluding that the Privacy Act should not be extended to organizations outside the Federal government is the recognition that some of the requirements imposed by the Privacy Act on Federal agencies simply do not, or cannot, apply to private-sector organizations. For example, the restriction the Privacy Act places on the collection of information on an individual’s exercise of his First Amendment rights would be ill-considered, and perhaps unconstitutional, if it were to be applied to all private-sector organizations without limitation.

Finally, the Commission has reached the conclusion that the Privacy Act needs significant modification and change if it is to accomplish its objectives within the Federal government. Much of this chapter supports that conclusion.

All of these arguments persuaded the Commission that it should not recommend omnibus legislation to extend the Privacy Act to other levels of government or to the private sector. The Commission further observes that even within the Federal government different requirements apply to some records about individuals. While the Privacy Act establishes minimum requirements for the keeping of records about individuals, other statutes set out additional ones directed at records maintained by particular agencies or used to perform particular functions.

The prohibitions on the disclosure of individual tax returns in the Tax Reform Act of 1976 are one example of such legislation. The rationale for these additional requirements recognizes that in government information about individuals is often acquired and recorded under different circumstances by different agencies. While every individual has a basic relationship with government that demands a minimum set of protections against abuse of the records government keeps about him, in specific circumstances the individual is entitled to a higher threshold of protection. This is particularly true in relation to standards limiting disclosure. The information a citizen gives to the revenue system, for example, because he is forced to do so under the threat of criminal sanctions, deserves more than minimum protections.

The Privacy Act of 1974

The Commission, as further discussed in Chapter 14, encourages the Congress to enact specifically targeted legislation in areas where the amount of detail in the records, the manner in which they are obtained, or the nature of the agency mission involved, warrant special safeguards.

METHOD OF STUDY AND ANALYSIS

To assess the Privacy Act’s requirements and the effectiveness of its implementation, the Commission sought to identify the principles and underlying philosophy that formed the basis for the Act. To do so, a study of the Act’s legislative history, the language of the law, and its actual implementation was necessary. The findings and conclusions presented below are based on communications with agency heads and their designated Privacy Act points-of-contact, testimony from various Commission hearings, agency annual reports, some informal workshops, and literally hundreds of personal and telephone interviews by staff. Although the Commission’s inquiry was conducted in the early days of the Act’s implementation, it believes that this close and continuous staff contact with agency operating personnel has allowed a fair assessment of agency implementation experience.2

In conducting its inquiry, however, the Commission encountered both conceptual and drafting problems with the current law. As the subsequent discussion will indicate, drafting details can have important consequences in an area which is both new to regulation and dependent upon changing technology. Thus, the Commission’s conclusions concentrate on policy objectives rather than on the specifics of implementation. Its objective in setting out its conclusions and offering suggestions for change in the Act is to allow the policy objectives of the current law to be achieved more successfully without destroying necessary opportunities for flexibility in implementation. The Commission adopted this approach to allow for changing information technology and diversity of agency information needs and uses, as well as to foster the constructive creativity that can arise in the absence of overly restrictive requirements.

In many instances, the difficulty with the current law is not in its objectives nor in the flexibility it allows, but rather that agencies have taken advantage of its flexibility to contravene its spirit. Yet, making the law less flexible is not a desirable solution. Implementation costs would rise dramatically, and new developments in information technology could invite uncontrollable circumvention of rigidities in the statute. Thus, the Commission’s approach is to strengthen flexibility and provide incentives for agency compliance while preserving the essential autonomy of each agency to decide how best to comply with each requirement.

If one accepts the view that it is best to tell an agency what to do, rather than how to do it, there are still issues that each agency cannot, and in some cases should not, resolve singly. The most obvious one is the question of

2 The detailed results of this inquiry will be presented in a separately published appendix volume that will also contain an illustrative statute showing how the Commission’s suggestions might appear as legislative requirements.
The Privacy Act of 1974

and Welfare, Elliot L. Richardson, to explore, as its name suggested, the impact of computers on record keeping about individuals and, in addition, to inquire into, and make recommendations regarding, the use of the Social Security number. The Advisory Committee did not examine issues arising from the physical surveillance of individuals or the wiretapping of conversations. Nor did it study mail openings, harassment of political dissidents, or violations of Fourth or Fifth Amendments rights. Instead, the Committee limited its inquiry to the use of records about individuals by government agencies and private organizations, and it focused its recommendations on automated systems while also suggesting their possible applicability to manual systems.

After examining various definitions of privacy, the Secretary's Advisory Committee concluded that the most significant aspect of the way organizations keep and use records about individuals was the extent to which individuals to whom the records pertained were unable to control their use. Accordingly, to strike a better balance between institutional and individual prerogatives, the Committee recommended a "Code of Fair Information Practices" based on the following five principles:

- There must be no personal data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

These five principles and the findings of the DHEW Committee, published in July 1973, are generally credited with supplying the intellectual framework for the Privacy Act of 1974, though in drafting the statute the Congress, influenced by its own inquiries, refined the five principles to eight:

1. There shall be no personal-data record-keeping system whose very existence is secret and there shall be a policy of openness about an organization's personal-data record-keeping policies, practices, and systems. (The Openness Principle)
2. An individual about whom information is maintained by a record-keeping organization in individually identifiable form

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3 Letter from Hon. Bert Lance, Director, Office of Management and Budget, to Senator Abraham A. Ribicoff, Chairman, Committee on Governmental Affairs, United States Senate, March 1977, including a report on Costs of Implementing the Privacy Act of 1974, p. 5.
5 This identification of eight principles results from Commission analysis, not a specific Congressional statement.
shall have a right to see and copy that information. (The Individual Access Principle)

(3) An individual about whom information is maintained by a record-keeping organization shall have a right to correct or amend the substance of that information. (The Individual Participation Principle)

(4) There shall be limits on the types of information an organization may collect about an individual, as well as certain requirements with respect to the manner in which it collects such information. (The Collection Limitation Principle)

(5) There shall be limits on the internal uses of information about an individual within a record-keeping organization. (The Use Limitation Principle)

(6) There shall be limits on the external disclosures of information about an individual a record-keeping organization may make. (The Disclosure Limitation Principle)

(7) A record-keeping organization shall bear an affirmative responsibility for establishing reasonable and proper information management policies and practices which assure that its collection, maintenance, use, and dissemination of information about an individual is necessary and lawful and the information itself is current and accurate. (The Information Management Principle)

(8) A record-keeping organization shall be accountable for its personal-data record-keeping policies, practices, and systems. (The Accountability Principle)

Each of these principles is manifest in one or more of the Privacy Act's specific requirements, and in their application they all require a balancing of individual, organizational, and societal interests.

**FINDINGS AND CONCLUSIONS**

In assessing the Privacy Act of 1974, the Commission sought answers to the following two questions:

- Does the Act effectively address the issues and problems it was intended to address?
- Are there important information policy issues and problems the Act might address but does not address, or does not address adequately?

On the whole, the Commission has concluded that:

(1) The Privacy Act represents a large step forward, but it has not resulted in the general benefits to the public that either its legislative history or the prevailing opinion as to its accomplishments would lead one to expect;

(2) Agency compliance with the Act is difficult to assess because of the ambiguity of some of the Act's requirements, but, on balance, it appears to be neither deplorable nor exemplary;

(3) The Act ignores or only marginally addresses some personal-data record-keeping policy issues of major importance now and for the future.

The more specific conclusions that follow stem from these three basic conclusions. The Commission believes that if the Congress seeks to remedy these deficiencies by amending the Act, three steps are essential:

First, the ambiguous language in the law should be clarified to minimize variations in interpretation, but not implementation, of the law.

Second, any clarification should incorporate "reasonableness tests" to allow flexibility and thus give the agencies incentives to attend to implementation issues and to take account of the differences between manual and automated recordkeeping, diverse agency record-keeping requirements, and future technological developments.

Third, the Act's reliance on its system-of-records definition as the sole basis for activating all of its requirements should be abandoned in favor of an approach that activates specific requirements as warranted.

The impact of the first two of these suggestions will become clear when the specifics of the Commission's other, more detailed, conclusions are explained. The third, however, is central to the operation of the Act. From an examination of both the language of the Act and its legislative history, it seems clear that the intent of Congress was to include in the definition of the term "record" every one that contains any kind of individually identifiable information about an individual. However, because the Congress was mindful of the burden such a definition could impose on an agency, it limited the Act's coverage to records retrieved from a "system of records" by "name . . . or identifying number, symbol, or other identifying particular . . . ." [5 U.S.C. §552(a)(5)] Thus, unless an agency, in fact, retrieves recorded information by reference to a "name . . . identifying symbol, or other identifying particular . . . ." the system in which the information is maintained is not covered by the Act. Whereas the current record definition refers to information about an individual which contains his name or identifier, the system-of-records definition refers to information about an individual which is retrieved by name, identifier, or identifying particular. The crucial difference is obvious, and the effect has been wholesale exclusion from the Act's scope of records that are not accessed by name,

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6 The Act defines a "record" as "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 U.S.C. §552(a)(4)]
identifier, or assigned particular. None of the Act's protections accrue to an individual whose record is so treated.

There are many examples of readily accessible individually identifiable agency records that are not retrieved by personal identifier, and current and emerging computer and telecommunications technology will create more. While the language of the Act speaks in terms of retrieval by discrete individual identifiers, most automated record systems facilitate identification of an individual's record based on some combination of the individual's attributes or characteristics, natural or assigned, as well as by reference to individual identifiers in the more conventional sense. Thus, it would be easy to program a computer to locate particular individuals through attribute searches (e.g., "list all blonde, female Executive Directors of Federal Commissions"). Retrieval of individually identifiable information by scanning (or searching) large volumes of computer records is not only possible but an ever-increasing agency practice. The Federal Trade Commission, for example, is transcribing all written material in its litigation files for computer retrieval, thereby making it possible to search for all occurrences of a particular name, or any other character pattern for that matter.

In summary, the system-of-records definition has two limitations. First, it undermines the Act's objective of allowing an individual to have access to the records an agency maintains about him, and second, by serving as the activating, or "on/off switch" for the Act's other provisions, it unnecessarily limits the Act's scope. To solve this problem without placing an unreasonable burden on the agencies, the Commission believes the Act's definition of a system of records should be abandoned and its definition of a record amended.

The term record should include attributes and other personal characteristics assigned to an individual, and a new term, accessible record, should be defined to delineate those individually identifiable records that are available to an individual in response to an access request. Accessible records would include those which, while not retrieved by an individual identifier, could be retrieved by an agency without unreasonably burdening it, either through its regular retrieval procedures or because the subject is able to help the agency find the record. If an individual knew he was mentioned in a particular record, for example, he would be entitled to access it whether or not agency practice is to access the record by reference to him.

The Commission believes that when an individual asks to see and copy information an agency maintains on him, the agency should be required to provide that information if it can do so without an unreasonable expenditure of time, money, or other resources or if the individual can provide specific enough locating information to render the record accessible without an unreasonable expenditure. In implementing this provision, however, an agency should not have to establish any new cross-referencing schemes for the purpose of granting access, such as would be required if the agency had to be aware of all references to one individual in other individuals' files or in files indexed in any other manner (e.g., references to agency offices in files indexed by agency name). In this connection, the Commission would also urge deletion of the clause (in Subsection d(1)) of the Act which requires an agency to allow an individual access "to any information pertaining to him which is contained in the system . . . ." This requirement is impossible to satisfy since an agency often does not know how to find "all" such information.

The Commission also believes that the terms record, individually identifiable record, and accessible record should operate as separate activates, or "on/off switches," for the appropriate provisions of the Act. For example, the Act's civil remedies could apply in all cases in which the misuse of an individually identifiable record through failure to comply with one of the Act's requirements resulted in injury to an individual, while the access to records provision could be subject to the reasonable burden test of the accessible record definition. This would allow more flexibility and broaden the scope of the Act.

Another provision of the Act that limits its scope is the one dealing with contractors. Recipients of discretionary Federal grants who perform functions similar or identical to functions performed by contractors are not covered. Agency personnel interviewed by Commission staff frequently expressed the view that the implicit distinction in the Act between contractors and grantees is, in many cases, artificial. The Commission agrees. In Chapter 15, moreover, it recommends that a uniform set of requirements and safeguards be applied to records collected or maintained in individually identifiable form for a research or statistical purpose under Federal authority or with Federal funds, and the Privacy Act is suggested as a basic vehicle for implementing these recommendations.

While care must be taken to avoid creating undue burdens on the contractor or grantee, the Commission believes that the Federal government must assure that the basic protections of the Privacy Act apply to records generated with Federal funds for use by the Federal government. Specifically, the Commission believes that any contractor or recipient of a discretionary Federal grant, or any subcontractor thereof, who performs any function on behalf of a Federal agency which requires the contractor or grantee to maintain individually identifiable records, should be subject to the provisions of the Act. The Act, however, should not apply to employment, personnel, or administrative records the contractor or grantee maintains as a necessary aspect of supporting the contract or grant, but which bear no other relation to its performance. The Act also should not apply to individually identifiable records to which the following three conditions all apply: (1) records that are neither required nor implied by terms of the contract or grant; (2) records for which no representation of Federal
sponsorship or association is made; and (3) records that will not be provided to the Federal agency with which the contract or grant is established, except for authorized audits or investigations. The added specificity in delineating which records fall within the Act's purview represents an attempt to preserve the intent of the Act while removing some of the confusion that could result in undue burden on contractors and grantees.

The remaining analysis of agency implementation of the Privacy Act will be based on the eight Privacy Act principles identified earlier. The extent of their fulfillment will be examined and the Commission's suggestions for change in their implementation will be presented and explained.

IMPLEMENTATION OF THE PRIVACY ACT PRINCIPLES

THE OPENNESS PRINCIPLE

The Privacy Act asserts that an agency of the Federal government must not be secretive about its personal-data record-keeping policies, practices, and systems. No agency may conceal the existence of any personal-data record-keeping system, and each agency that maintains such a system must describe publicly both the kinds of information in it and the manner in which it will be used. This is accomplished in two ways. The first is through the required annual publication of system notices in the Federal Register. The second is through the "Privacy Act Statement" given at the time individually identifiable information is collected from an individual.

The requirements implementing the Openness Principle are intended to achieve two general goals:

1. facilitate public scrutiny of Federal agency record-keeping policies, practices, and systems by interested and knowledgeable parties; and
2. make the citizen aware of systems in which a record on him is likely to exist.

The Commission has found that the Act has made a significant step toward fulfillment of these objectives, especially the first one, but that it has still fallen short of expectations.

The Commission believes that publishing record-system notices once each year in the Federal Register is worthwhile. It develops an inventory of agency record-keeping operations that is useful for both public scrutiny of Federal agency record-keeping practices and for internal management control. Unfortunately, however, the annual notices tend to be less informative than they could be, and they are not required to describe the extent to which information is used within the agency. Furthermore, the Act is silent on the distinction between a system and a subsystem, and there are no criteria for limiting the diversity of information, purposes, or functions that may be incorporated in any one record system, and thus subsumed in

one annual Federal Register notice. As a result, some annual notices are too encompassing to be informative. Likewise, duplicate, substantially similar, or derivative systems are frequently either unlisted or not cross-referenced. The Commission believes that the primary purpose of the public notice requirement should be to facilitate internal and external oversight of agency activities, including public scrutiny. Thus, it believes that the annual notices should provide more detail than they now do and should reflect more accurately the context or manner in which an agency maintains records.

One of the specific shortcomings of the system notices has been the literal interpretation of the requirement to describe the routine uses. While limiting these descriptions to external uses is consistent with the prevailing interpretation of the Act's routine-use definition, in many cases, the more significant uses are internal ones. Therefore, the Commission believes that the section in the annual notice on routine uses of records maintained in a system, including categories of uses and the purposes of such uses, should include a description of internal uses of information as well as external disclosures.

Describing the context and manner in which an agency uses the records in a system would at least partially reveal the relationships among systems that are often obscured today. When a large, complex record system is covered by one system notice, the subsystems should be described in detail. The important concern should not be to define the level at which a subsystem must be described, or the way to describe indices, but rather that an agency present a true picture of how it uses information in a system and how the system itself is perceived by the agency. The goal should be to remain faithful to the Openness Principle by assuring that there are no secret systems. The possibility that an agency may comply with the technical requirements of the Act's notice provisions but still maintain systems that are effectively secret must be avoided.

The goal of facilitating public scrutiny is hindered by the fact that the Federal Register is at best a limited vehicle for reaching the general public. Every effort should be made to classify, compile, and index the information in notices logically. For example, it would be useful to differentiate between the large group of systems that are solely devoted to record keeping about agency personnel and the much smaller group that contains information on citizens in general. The Federal Register compilation should make it easy for a private citizen, a member of a public interest group, or a congressional staff member to pinpoint a particular type of record or system of records.

Given the limited readership of the Federal Register, however, the best way of making the citizen aware of systems in which he is included is through the "Privacy Act Statement," which is similar to the annual system notice, except that it also informs the individual of internal agency uses of information about him. Like the annual notices, however, Privacy Act Statements are often too vague or general to inform the individual adequately. They need not explain that supplementary information may be collected from other sources and not every agency or system is subject to the Statement requirement.

There is a problem in finding a balance between the length of a Privacy Act Statement and its clarity; if it is too long, individuals are not
The Privacy Act of 1974

Information Act still appears to be much sharper than its awareness of the Privacy Act. Another reason may also be that the Privacy Act's own exemptions from the access requirement are too sweeping. The Central Intelligence Agency and some major law enforcement systems qualify for a blanket exemption from the access requirement. Thus, individuals who want access to records about themselves in those systems must use the Freedom of Information Act as their vehicle.

The Privacy Act exemptions from the individual access requirement are permissive, not mandatory. In addition, unlike the Freedom of Information Act exemptions, they apply to systems of records rather than to specific requests for access to specific information. To invoke any one of them an agency must publish its intention to do so in advance. As a result, some over-cautious lawyers and administrators have made excessively broad claims of exemption. Once an exemption is published, moreover, agency operating personnel are inclined to use it, thus eliminating exercises of judgment in light of the particular record sought.

On the other hand, some agencies have not claimed exemptions to which they may have been entitled, and others have claimed them but do not use them. The Central Intelligence Agency, for example, processes individual access requests under the Privacy Act despite having claimed the broad exemption the Act provides.

In balance, however, the Act's requirement that exemptions be claimed in advance, and that they cover entire systems rather than types of records or specific requests, has resulted in unnecessary exclusions of records from the scope of the Act's individual access requirement.

Agency rules on individual access, and on the exercise of the other rights the Act establishes, appear, in most instances, to be in compliance with the Act's rule-making requirements. Yet, they too are often difficult to comprehend, and because the principal places to find them are in the Federal Register and the Code of Federal Regulations, it is doubtful that many people know they exist, let alone how to locate and interpret them. Furthermore, the Act's requirement that an individual specifically name the record system in which the record he desires is located is not realistic. Fortunately, many agencies have gone beyond the letter of the law in assisting individuals whose access requests reasonably describe the records sought, but the requirement to name the system still seems likely to discourage some people from asking to see their records. Finally, the Act's requirement that an agency keep an accounting of each disclosure of a record to the individual to whom it pertains appears to be an added incentive to process access requests under the Freedom of Information Act rather than the Privacy Act when an agency has a choice (i.e., when the individual does not specify that his request is being made under one Act or the other).

It would appear, in sum, that individuals continue to rely on pre-existing laws and practices when they want access to agency records about themselves. From the individual's point of view, one advantage of the Freedom of Information Act is that there are specific limits on how long an agency may take to respond to a request, whereas in the Privacy Act there
are none. Furthermore, although the FOIA permits agencies to charge search fees, while the Privacy Act does not, in practice such charges are rarely made when an individual is asking for information about himself.

The Privacy Act has benefited a current or past Federal employee to the extent that it allows him to circumvent the FOIA exemption for documents pertaining to internal agency deliberations when he wants access to some of the more interesting parts of an evaluation report or inquiry into his background. The Privacy Act has retained a limited exemption for some personnel evaluations, but its net effect has been to increase the accessibility of such material. It could also be concluded that Federal employees, unlike the private citizen, are aware that the Act exists and, being comfortable with bureaucratic procedures, have quickly learned how to use it.

To aid an individual in gaining access to his record, the Commission believes that the Privacy Act should parallel the approach of the Freedom of Information Act in that an individual should be required to make a request which reasonably describes the record to which he desires access. In those situations in which an agency believes an individual has made too broad an access request, it should help him refine his request. This is the procedure most agencies are following now, but modification of the language of the Act is important. The likelihood of a private citizen being aware of the name of a system of records published in the Federal Register is too remote to be relied on.

In addition, the Commission believes that the Privacy Act should be the exclusive vehicle for individuals requesting access to records about themselves, provided that the Privacy Act's approach to exemptions from the individual access requirement is modified to parallel that of the Freedom of Information Act (as discussed below). Making the exemption approaches parallel is necessary to assure that the individual does not receive less information using the Privacy Act as his access vehicle than he would if his request for access were processed under the Freedom of Information Act. Because agencies may currently ignore the time limits suggested in guidelines for implementation of the Privacy Act issued by the Office of Management and Budget, explicit time limits should also be added to the Privacy Act so that by making the Act the individual's exclusive access vehicle he will not lose the time limit protections now in the Freedom of Information Act. The fees, appeal rights, and sanctions of the Privacy Act, however, would still apply.

Besides the direct benefits for the individual of such an approach there are certain procedural benefits to the agencies which should be noted. Currently, Freedom of Information Act offices and officers are required to respond to requests for access to both personal information about individuals and information about agency activities (e.g., regarding agency policies). By making the Privacy Act the exclusive access vehicle for any individual requesting information about himself, some stress will be removed. The actual number of requests for information will not be affected, but this approach better divides responsibility in the agencies.

Perhaps some of the confusion surrounding the interrelation between the Freedom of Information Act and the Privacy Act will even be reduced.

In addition to requiring an agency to assist an individual in reasonably describing the records to which he seeks access, it is important for an individual to have access to, and the right to amend, information about which he may not have enough detailed knowledge to formulate a specific request. Thus, the Commission believes that access to substantially similar or derivative versions of records sought by an individual should be provided automatically in response to his request for the original record to the extent that providing such access does not constitute an unreasonable burden on the agency.

There are two related situations at issue here. The first is where there may be an exact duplicate of a record maintained in another part of the agency. The second, and more important, is where some portion of a record may have been copied and then subsequently amended, appended, or otherwise altered. Alternatively, two records, or portions thereof, may have been combined. In each of these cases, it can be reasonably inferred that the individual would want to know about all versions of the record were he aware of them. Thus, the burden must be on the agency to take reasonable affirmative steps to describe and, if requested, to make available to the individual the several versions. While the individual may not want to see an exact duplicate of the original record, for example, he may wish to amend it if he amends the original. Moreover, the uses and disclosures of exact duplicates of a record, as well as substantially similar or derivative versions of the record, often will not be the same as the uses and disclosures of the original, and thus it can be assumed that the individual will want to know about them.

The Commission believes that the Privacy Act's approach to exemptions from the individual access requirement should be modified to parallel that of the Freedom of Information Act. Currently, Privacy Act exemptions are claimed in advance and apply to entire systems of records. Pre-claimed exemptions can be waived on a case-by-case basis, and while there is evidence that agencies are not using all of the exemptions claimed, they still seem to be claiming every one possible (including, in some cases, exemptions to which they would not appear to be entitled), but then using them only as needed. This creates uncertainty for the individual which the framers of the Act did not intend.

Abandonment of the system-of-records definition currently in the Privacy Act necessitates a different exemption strategy than the one the Act now has. The natural model to use is the Freedom of Information Act. The FOIA allows exemptions for certain types of information rather than for entire systems of records; exemptions may be invoked only when applicable, not claimed in advance. In addition, any segregable portion of a record which by itself does not qualify for an exemption must be provided to the individual. The FOIA approach appears to be working well, and it's presumption that access should be granted to any part of a record for which an agency cannot sustain an exemption claim seems highly desirable.

Using the FOIA approach to exemptions would have the unintended effect, however, of voiding the Privacy Act provision that allows the CIA

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and law enforcement agencies to maintain unverified information obtained from intelligence or investigative sources. Consequently, if the suggested exemption policy is adopted, it should allow the CIA, or any agency or component thereof which performs as its principal function any activity relating to the enforcement of criminal laws, to maintain information whose accuracy, timeliness, completeness, or relevance is questionable, provided, however, that such information is clearly identified as such to all users or recipients of it. This would preserve the Act's current policy. The only new requirement would be that the unverified information be clearly identified as such when it is disclosed to anyone else.

The Commission believes that certain of the specific exemptions in the Freedom of Information Act should actually be duplicated in the Privacy Act. These include the Freedom of Information Act exemptions dealing with information specifically authorized to be kept secret in the interest of national defense and foreign policy, certain investigative information compiled for law enforcement purposes, and operating reports used by an agency responsible for the supervision of financial institutions. This, too, would clarify, without altering current policy, and it would have the further advantage of incorporating the existing body of judicial interpretation as to what may or may not be withheld pursuant to the FOIA exemptions. Today, an individual is supposed to be granted access to the larger of the amounts of information to which he would be entitled under the FOIA or the Privacy Act, so there seems to be no practical reason for the two Acts to have different exemptions in the same area.

Finally, the Commission believes that the Act's requirements with respect to a patient's access to a medical record an agency maintains about him should be brought into line with Recommendation (5) in Chapter 7 of this report. The Commission also believes that the Act should be refined to allow agencies to deny access to a parent or legal guardian in those situations in which another statute authorizes such withholding.

**The Individual Participation Principle**

The third Privacy Act principle holds that an individual should have the right to challenge the contents of a record on the grounds that it is not accurate, timely, complete, or relevant. The principle specifically recognizes that information can be a source of unfairness to an individual. In theory, the right to participate in the maintenance of a record allows for complaint, involvement, and representation in order to force a balancing of the individual's interests against the record keeper's. If this principle is enforced, the individual is able to keep some measure of control (although not absolute control) over the substance of what he himself reveals to an agency, as well as to check on what the agency collects about him from other sources.

The Act has made significant progress toward fulfillment of this principle through its requirement that agencies establish procedures whereby the individual may request correction or amendment of a record, appeal any denial of his request, and file a statement of disagreement if the denial and appeal result in a stand-off, either before or after judicial review. In allowing the individual to file a statement of disagreement, even after the agency's denial of his request is upheld by a court, the Act implicitly recognizes that the agency and the individual may have divergent interests in the content of a record, as well as the fact that there may be no clear-cut criteria for assessing accuracy, timeliness, completeness, or relevance.

Despite this Act's sophistication in this area, however, the correction and amendment rights have not been widely exercised. This doubtless reflects the small number of access requests under the Privacy Act, but it may also be due in part to the fact that so many of the agency records an individual might want to correct or amend are exempt from the individual access requirement and therefore not open for correction or amendment. Nevertheless, the right to correct or amend a record, once access has been obtained, is an area in which the Privacy Act represents a significant advance for the individual.

**The Collection Limitation Principle**

The fourth principle of the Privacy Act is that there shall be limits on the type of information a record-keeping institution collects about an individual, as well as certain requirements with respect to the manner in which it may be collected. An agency may not collect whatever information it wishes, nor may it collect information in whatever manner it wishes. The principle is implemented by requiring that agencies (1) collect only information that is relevant and necessary to accomplish a lawful purpose; (2) collect information to the greatest extent practicable directly from the subject individual; and (3) give every individual a Privacy Act Statement at the time individually identifiable information is requested of him, and, (4) in certain instances, refrain from collecting an individual's Social Security number and information relating to his exercise of First Amendment rights.

The requirement to limit collection to information that is relevant and necessary to accomplish a lawful purpose of the agency seems to have resulted in a modest amount of revision and reduction of data-collection forms, and consequently a modest reduction in data collection itself. In contrast, the requirement that agencies collect information to the greatest extent practicable from the subject individual does not appear to have changed practices at all.

The required "Privacy Act Statement" seems not to have had much of an effect on the amount of information individuals are asked to provide about themselves or on their willingness to provide it. There appears to have been a slight reduction in the willingness of individuals to answer survey

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13 5 U.S.C. 552a(j).
14 5 U.S.C. 552a(1).
15 5 U.S.C. 552a(2).
16 5 U.S.C. 552a(3).
17 Section 7 of Public Law 93-579.
18 5 U.S.C. 552a(7).
questions since passage of the Act, but this cannot be confidently attributed to the Privacy Act Statement.

In addition, there appears to be some troublesome ambiguity in the subsection of the Act that contains the "Privacy Act Statement" requirement. Subsection 3(e)(3) reads in part:

Each agency that maintains a system of records shall—

(3) inform each individual whom it asks to supply information

Some agencies have interpreted this to require a statement only when individually identifiable information is collected from the subject individual and not to require it when such information is collected from a third party. The Commission believes that a Privacy Act Statement should be provided to all individuals from whom individually identifiable information is collected, including third parties.

On the other hand, the Privacy Act Statement must now be supplied or read each time individually identifiable information is collected, regardless of the frequency of contact between an agency and an individual. This is burdensome to the agency and can cause the Statement to be ignored by the individual. The purpose of the Statement is to provide the individual with enough information to allow him to judge whether or not to provide the information requested. There appears to be no useful purpose in doing this repeatedly if the individual has been provided with a copy of the Statement within a reasonable period of time prior to a follow-up request for information so long as the follow-up request is consistent with the original statement. Thus, the Commission believes that the burden on agencies could be safely reduced by requiring that the individual be given a Privacy Act Statement only if he had not already been given a retention copy within a reasonable period of time prior to a subsequent request for information from him.

A second problem with the Privacy Act Statement is that it tends to state the obvious and does not explicitly spell out other possible uses of the information. The Commission, consistent with its recommendations in other areas, believes that the Statement should describe those uses of information that could reasonably be expected to influence an individual's decision to provide or not to provide the information requested. Since the individual's decision may be influenced by the techniques used to verify the information he provides, the Statement should also include a description of the scope, techniques, and sources to be used to verify or collect additional information about him.

Providing a concise statement on uses and third-party sources may, upon occasion, prove to be more confiding than enlightening. Therefore, the Statement should, in addition, identify the title, business address, and business telephone number of a responsible agency official who can answer any questions the individual may have about the Privacy Act Statement.

The proscription on the collection of information about how an individual exercises his First Amendment rights appears to have had no noticeable effect on agency collection practices. The prohibition does not apply when an agency is expressly authorized to collect such information either by statute or by the individual, or where collection is "pertinent to and within the scope of an authorized law enforcement activity." [5 U.S.C. 552a(e)(7)] Because virtually all government agencies can be said to be involved in some type of law enforcement, the latter exception, in particular, has tended to negate the prohibition. A more accurate, and hence more effective, way of stating the congressional intent would be to refer to "an authorized investigation of a violation of the law." This change would not prohibit an agency from collecting a specific item of information whose collection is expressly required by statute or expressly authorized by the individual to whom it pertains, or whose collection would be a reasonable and proper library, bibliographic, abstracting, or similar reference function.

Section 7 of the Privacy Act, which attempts to limit collection of the Social Security number from individuals, also appears to have had little effect on agency practice. Its "grandfather clause," which allows agencies to continue to demand the number if they did so under statute or regulation prior to January 1, 1975, has encompassed almost all uses of the Social Security number at the Federal level, as indicated in Chapter 16 below.

THE USE LIMITATION PRINCIPLE

The fifth Privacy Act principle asserts that, once collected, there are limits to the internal uses to which an agency may put information about an individual. Once an agency has legitimately obtained information, it still may not use it internally without restriction.

The Act requires an agency to obtain an individual's written consent before disclosing a record about him to any of its employees other than "officers and employees . . . who have a need for the record in the performance of their duties." [5 U.S.C. 552a(b)(1)] However, because the terms "need" and "duties" are open to interpretation, the effect of this restriction is limited.

In theory, the requirement speaks to the kind of situation described in Chapter 6, wherein the employee-employer relationship was seen to subsume other record-keeping relationships, such as the medical-care and insurance ones. A problem inherent in the provision is the fact that one agency may have many different types of relationships with an individual but the provision takes no account of the difference between them; for that reason it has no practical effect on limiting certain internal uses of information. This is particularly true in the case of the larger cabinet departments which, for purposes of the Privacy Act, have defined themselves as one "agency."

Where differences in record-keeping relationships have been recognized in other statutes, such as where a component of the Department of Health, Education, and Welfare is subject to a confidentiality statute elsewhere in the U. S. Code, the integrity of the relationship that the statute addresses may be preserved within the framework of Subsection 3(b)(1).

Section 1106 of the Social Security Act, for example, limits the disclosure of records maintained by the Social Security Administration, and thus it
functions as a limitation on internal agency uses of records, even though the Department of Health, Education, and Welfare has defined itself as one agency for the purposes of the Privacy Act.

It can reasonably be assumed that the Privacy Act was not intended to nullify other statutes which limit the use and dissemination of information. Indeed, while the Act is silent on this issue, the OMB Guidelines advise that: “Agencies shall continue to abide by other constraints on their authority to disclose information to a third party including, where appropriate, the likely effect upon the individual of making that disclosure.” One would expect the OMB guidance to be definitive, but the internal use issue is a murky one. The “confidentiality” statutes in the U.S. Code are many and various, and it is not clear how statutes that authorize use or disclosure, rather than prohibit it, should be treated in relation to Subsection 3(b)(1).

The Commission believes that the way to resolve this issue is through a revised routine-use provision that would apply to both internal and external agency uses and disclosures of information. Such a provision would act as a minimum standard against which potential uses and disclosures of information would be measured. It would supersede preexisting statutes that authorize disclosures in a vague or general manner, but not statutes in which the Congress, as a matter of public policy, has called for the use and disclosure of specific types of information in specific situations. Such a provision, moreover, would not be construed as expanding an agency’s authority to use or disclose information if the agency was already subject to a preexisting statute that restricted its use and disclosure of information more narrowly than the Privacy Act does.

The only way for the individual to discover the internal agency uses of a record about himself is through the “Privacy Act Statement,” which cannot anticipate future uses over which the agency has no control. For example, two days after the Privacy Act was passed, the Congress passed another law creating a Federal Parent Locator Service (PLS) authorized to obtain information from the Social Security Administration upon request, regardless of the strictures of other statutes such as the Privacy Act. As already noted, moreover, the “Privacy Act Statement” need not inform the individual that information about him may be collected from third parties, thereby diluting the effect of the Use Limitation Principle even further.

While the Commission believes that the problem of controlling internal uses of information cannot be solved by levying specific requirements on the agencies, the “routine use” provision, which forbids disclosures that are not compatible with the purpose for which the information was originally collected, should be applied to internal agency uses. In addition, by strengthening the individual enforcement mechanism and establishing a central office within each agency for Privacy Act implementation (see below), compliance with the spirit of the internal use requirements will be improved.

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19 The Privacy Act of 1974

The Disclosure Limitation Principle

The sixth Privacy Act principle asserts that there must be limits on the external disclosures of information an agency may make. That is, once an agency has legitimately obtained information, it still may not disclose it externally without restriction.

The Privacy Act authorizes ten categories of external disclosures that may be made without the consent of the individual. The most important one is found in Subsection 3(b)(3) which authorizes any disclosure that has been established as a “routine use”; that is, any disclosure for a “purpose which is compatible with the purpose for which [the information] was collected.” 5 U.S.C. 552(a)(3); 5 U.S.C 552a(a)(7). The key word is “compatible,” which some agencies have interpreted quite broadly. As but one example, the United States Marshals Service published a routine-use notice on September 16, 1976, which read in part:

A record may be disseminated to a Federal agency, in response to its request, in connection with . . . the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information relates to the requesting agency’s decision on the matter.

Other agencies, however, have interpreted the routine-use provision narrowly. Prior to passage of the Privacy Act, the Railroad Retirement Board (RRB) obtained benefit and employee name and address information from the Social Security Administration (SSA) to check the accuracy of payments made to claimants under the Railroad Unemployment Insurance Act (RUlA). The statute requires RUlA benefits to be calculated in the light of all other social insurance, employment, or sickness benefits payable to an individual by law. Today, however, the RRB is no longer obtaining information from the SSA, because the SSA has concluded that it cannot legitimately establish the disclosure as a routine use. The RRB estimates that this is costing it more than $35,000 a year in unnecessary payments.

Another problem with the routine-use provision for disclosures in Subsection 3(b)(3) is its relation to Subsection 3(b)(7), which authorizes disclosures of individually identifiable information to agencies for law enforcement purposes if the head of the agency requests the information in writing and specifies the legitimate law enforcement activity for which the information is desired. While treating the routine-use provision narrowly for some purposes, most agencies have employed it in combination with other laws to facilitate the flow of information to and between law enforcement and investigative units.

The combination of the Privacy Act’s routine-use provision and Section 534 of Title 28, for example, permits agencies to circumvent the requirements of Subsection 3(b)(7). Under Section 534 of Title 28, the Department of Justice is required to maintain a central law enforcement information bank and to provide a clearinghouse for such information, particularly for agencies of the Federal government. Agencies have

understood this provision to be a congressional endorsement of the routine 
exchange of law enforcement information, at least under the auspices of the 
Attorney General.

Currently, agencies of the Federal government seem to be employing 
the routine-use provision in order to permit the free flow of law enforcement 
and investigative information without having to comply with the standards 
of Subsection 3(b)(7). Agency system notices frequently indicate that 
information will be supplied to appropriate Federal, State, local, and, 
sometimes, foreign law enforcement agencies of government. In short, the 
Privacy Act does not place an effective burden on, or barriers to, the free 
flow of information within the law enforcement and investigative 
community.

Concurrent with formal endorsement of relatively unrestricted informa-
tion flow to and between investigative agencies, the agents of investiga-
tive units have continued to employ the informal information network 
that exists within the law enforcement community. An agent of one unit may 
call his counterpart in a second agency to see if it might have any information 
on the subject of an investigation or any leads to people who might be 
appropriate to investigate. As the system currently operates, there would 
be some impediments to such disclosure—though not insurmountable ones— 
where the units of government involved only investigative agencies and the 
information exchanged came exclusively from their files. Today, however, 
the unfettered ability to exchange information between law enforcement 
and investigative units amounts to access by such units to virtually any 
governmental records without the need to comply with the strictures in 
Subsection 3(b)(7).

Almost all agencies have law enforcement units of one sort or another 
through which information desired by other units in other agencies may be 
channeled. Indeed, the law enforcement unit of an agency might seek 
information on an individual from records maintained by other components 
of an agency and transmit it to a second agency which could subsequently 
maintain it in a form (e.g., retrievable by docket number) which leaves it free 
of Privacy Act restrictions. Law enforcement units and investigation 
agencies can, and often do, operate in this fashion and thus function as a 
conduit for the exchange of information with other law enforcement units. 
The problem is not so much that law enforcement units disclose information 
about individuals to illegitimate recipients, but rather that the determination 
of legitimacy is more often than not highly informal, with the decision to 
disclose being made by anyone from the field agent level to the head of an 
agey. Such informality presents substantial potential for improper 
disclosure. This is a problem the Commission has not dealt with extensively, 
though a structure for effective examination of it is suggested later in this 
chapter.

Although the effect of the routine-use provision has been limited, due 
mainly to the fact that it has been interpreted as applying only to external 
transfers of information, its safety-valve aspects should be preserved. The 
disclosure provisions of the Privacy Act must allow for a certain amount of 
agey discretion, since, in an omnibus statute, it is impossible to enumerate 
all of the necessary conditions of disclosure. Nonetheless, the Commission 
believes that the compatible-purpose test of the routine-use provision should be 
augmented by a test for consistency, with the conditions or reasonable 
expectations of use and disclosure under which the information was provided, 
collected, or obtained. The individual's point of view must be represented in 
the agency's decision to use or disclose information, and today the 
compatible-purpose test only takes account of the agency's point of view.

The routine-use definition should also apply to internal, as well as 
external, agency uses and disclosures of information. This is important, since 
the majority of uses of information are made by the agency that originally 
collects it.

Congress may, of course, elect, as it has done in the Tax Reform Act of 
1976, to authorize particular uses or disclosures of information that are 
either incompatible with the purpose for which the information was 
collected, or inconsistent with the individual's reasonable expectations of 
use and disclosure. Such additional uses and disclosures of information 
should be treated as routine uses, provided that the statute authorizing them 
establishes specific criteria for use or disclosure of specific types of 
information. Ideally, the Congress should review all the statutes that 
authorize such incompatible uses and disclosures and determine which ones 
it wishes to retain. The point, however, is that the Commission, as in other 
areas, believes that blanket disclosure authorizations or limitations should 
be actively discouraged.

One might think of incompatible uses and disclosures as "collateral 
uses." The question of whether a particular use or disclosure qualifies as a 
"collateral use" would then arise only after it has been established that the 
proposed use or disclosure was not a "routine use." The "collateral use" 
concept would also give the Congress a means of relating subsequently 
effectively enacted disclosure statutes to the Privacy Act so that there will be no 
question about whether such disclosures are subject to the Act's require-
ments. As indicated earlier, and as discussed more thoroughly in Chapter 14, 
the Tax Reform Act of 1976 is a good example of how this would work.

Besides resolving the routine-use issue, there is also a need to take 
explicit account in the Act of agency disclosures concerning constituents of 
Members of Congress. In the early days of the Act's implementation, 
Congress had trouble obtaining information for its own use. Congressional 
caseworkers found that they were unable to get individually identifiable 
information from agencies when they called them on behalf of constituents. 
Agencies refused to give out information to Members of Congress unless 
they received prior consent from the individual, since Subsection 3(b)(9) 
only authorizes disclosures to congressional committees or to the House or 
Senate as a whole. Members of Congress felt this undermined their role as 
representatives of their constituents, and it was, in fact, an oversight in the 
drafting of the current law.

To solve this problem, the Office of Management and Budget
than exposing the whole process, tends to limit openness. Nonetheless, a privacy claim seldom involves a government official or decision, but rather an individual, and a more restrictive definition of public record may permit such a claim.

The question of who has access to records has received little judicial attention in Florida. The 1975 amendment to the Public Records Law changed the statute to provide access to "any person" rather than "any citizen of Florida." The previous interpretation of citizen had been broad as compared to the common law requirement of interest on the part of the requesting person. The current statute is very broad, with the issue of access rarely considered in Florida public records cases.

Federal cases indicate that privacy protection can depend on the nature of disclosure, that is, the nature of the person obtaining information. The United States Supreme Court, in Whalen v. Roe, distinguished disclosure to state employees from disclosure to the public. This implied that a statute permitting disclosure to agency personnel, but not to the public generally, might satisfy the privacy interest, although at the expense of effective self-government. The Fifth Circuit in Plante rejected such an argument, choosing instead to improve the electoral process by requiring broader financial disclosure instead of limited disclosure to an ethics commission. The Supreme Court also mentioned improving the electoral process in Buckley v. Valeo. Although both Buckley and Plante involved elected officials, the public interest in disclosure extends to affairs of government generally. Thus, the question of who has access must be considered in reconciling the interest in personal privacy and public access.

Some Problems with the Florida Public Records Law

An overly broad statute and strict judicial interpretation have distorted the original purpose of open records and access in Florida. Florida's definition of a public record allows access by anyone, and permits exemptions only by legislative amendment. The state courts have refused to establish exemptions in light of the statute, and have not determined that disclosural privacy is a legitimate constitutional right which would override the state interest. There are three problems with this current application of Florida law.

Government files hold information comprised of both public business and private revelations. The policy behind open records and access to information is to allow citizens to obtain information about the operations and policies of government. This intent is distorted where the public records concept is used to gain information only about an individual, as in the Fadojo case. The privacy interest involved should not yield to an overly broad open records statute and statutory interpretation.

In examining the importance of personal privacy, A. R. Miller has said,

"Knowingly or unknowingly, those who believe themselves watched will modify their behavior to please in the eyes of the watcher if there is any fear that they are vulnerable to the will of that watcher. It does not even matter that there actually be a watcher; all that is necessary is that people believe there is."

This statement could be used either to argue against access to records for privacy reasons, or to justify access to records for the ideal of effective self-government. Privacy and open records can be compatible, but accommodation requires acknowledging the value of each. The right to know demands public exposure of recorded official action, but that right should apply with less force to personal information supplied by private citizens. "If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of nonaccess."

Another problem of the Florida Public Records Law is common to all records laws: Increasing computerization makes more information available, and improves storage and access. More information can be compiled about individuals and remain easily accessible for long periods of time. The concept of open records developed prior to computer technology, and emphasized that all government records be open. This statutory direction remains unchanged, notwithstanding the proliferation of government records about individuals. New technology may now require, in the interest of personal privacy, that a distinction be made between records about government and government records about individuals.

A third problem of the Florida records law concerns the lack of attention given to the individual's interests in the legislative and judicial determination to maintain a broad right of access. Many states have accommodated the right of privacy within the open records law. California law, for example, exempts

174. See Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922).
176. See State ex rel. Cummer v. Pace, 118 Fla. 496, 500, 159 So. 679, 681 (1935) (allowing competitor corporation access to records involving municipal docks and terminals); State ex rel. Davidson v. Couch, 115 Fla. 115, 118, 155 So. 153, 154 (1934) (allowing certified public accountant access to city accounts and books of account); But see (1951-1952) Fla. Atty Gen. Biennial Rep. 588, 489-90 (a person requesting access to a state licensing board file is required to show interest). See text accompanying note 136 supra.
179. 575 F.2d 1157 (1978).
courts must eventually recognize the right of disclosural privacy in deference to *Fadjo*’s holding that disclosural privacy is a legitimate third strand of the constitutionally protected right of privacy.

The Florida Legislature considered the conflict in formulating the state constitutional right of privacy adopted in 1980, but decided to give priority to the right of access. The final sentence of the amendment, “This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law,” was added to prohibit use of the privacy amendment to impede public access to public information. The legislature designed the amendment to control collection of information rather than disclosure. Once information is in the hands of government, however, the conflict between privacy and access remains.

The Florida Public Records Law must be changed to accommodate the value of disclosural privacy. The right to privacy, as it has developed, is not absolute, and acknowledges the necessity of disclosure in certain circumstances. Justice Brandeis and Warren recognized that any rule of liability must be flexible enough to take account of the varying circumstances of each case. The right of public access to government information, as it has developed, recognizes the need for non-disclosure in certain circumstances. At common law, and in most states today, this recognition extends to protect personal privacy where that interest outweighs the public’s need to know. Florida provides a number of exemptions to the Public Records Law, but does not accommodate the privacy interest.

Florida law can accommodate privacy in a manner similar to other states and the federal Freedom of Information Act. Attention should be given to three aspects of the law which follow the factors discussed in the previous section. First, and most important, a general exemption should be added to the Florida law, enabling the courts to balance privacy and access on a case-by-case basis. Second, the definition of public records should be narrowed to distinguish between information about government and information about individuals. This latter type of information should not be considered public except for certain narrow purposes. Third, access to records containing personal information should be granted not to any person, but only to those with a legitimate interest in the personal information. The conflict in *Fadjo* arose not because the government had access to personal information, but because disclosure was made to a private party without furthering the policy underlying the public’s right to know.

A General Exemption

Existing amendments to the Florida Public Records Law limit access for

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188. CAL. GOV'T CODE §6255 (West 1975). See Comment, Informational Privacy and Public Records, 8 PAC. L.J. 23, 56 (1977). For the balancing approach in Louisiana, see Trehain v. Larivee, 565 So. 2d 294 (La. Dist. Ct. App. 1978). In a dispute over access to city employee performance ratings, the court balanced the state constitutional right of privacy against the state public records law, and held against disclosure. Id. at 300. La. CONSTITUTION art. 1, § 5; La. REV. STAT. ANN. § 44 (West 1980). The court found that “the public interest in efficient government is better served by keeping these evaluations confidential.” 565 So. 2d at 300. In contrast, a balancing resulted in disclosure in Webb v. City of Shreveport, 571 So. 2d 516 (La. Ct. App.), cert. denied, 574 So. 2d 657 (La. 1979) (involving a computer print-out of names and addresses of municipal employees).

189. The Computerization of Government Files, supra note 9, at 1425.

190. Cope, supra note 19, at 730. Proposal No. 138 provided that: “no person shall be denied the right to examine any public record made or received in conjunction with the public business by any nonjudicial public officer or employee in the state or by persons acting on their behalf. The legislature may exempt records by general law where it is essential to protect privacy interests or overriding governmental purposes.” Id. The second sentence was deleted by the Commission prior to placing the amendment on the ballot. Id. at 730.

191. See note supra.
certain specific reasons. But the Florida supreme court in 
Wait held that only 
the legislature can establish exemptions. Even where a valid public policy reason exists, as in 
Fadjo, courts depend on the legislature to establish 
the exemption. Under common law, and prior to 1975, the courts could establish exemptions in the interest of public policy. Under current law, the list of exemptions will increase in a piecemeal fashion to protect the interest of the 
state. This approach will fail to accommodate the individual's interests in privacy. 
A general exemption in the law, such as that in the California Public Records Act, will accommodate individual interests in privacy. The 
California statute was modeled after the Freedom of Information Act, and included an exemption for records where the public's interest in non-disclosure clearly outweighs the public's interest in disclosure. The presumption is in favor of 
disclosure, but the exemption permits agency and judicial discretion to favor 
privacy where required by the public interest. The exemption requires the 
public agency and reviewing court to balance the interests involved. 
A similar balancing is desirable in Florida, but the middle-tier balancing test enunciated by the Fifth Circuit in 
Plante and 
Fadjo gives no presumption to disclosure. Rather than place the burden of demonstration on the proponent of 
confidentiality, the Fifth Circuit treats the interests of disclosure and access to records as roughly equal. Therefore, disclosure is allowed only where a legitimate state interest is demonstrated that outweighs the privacy threat to the plaintiff. This formulation of the balancing test suggests language for the Florida Public Records Law different than that used in California. Section 119.07 should include an exemption for personal information 
where disclosure would be an unwarranted invasion of personal privacy, unless the public interest in a particular case compels disclosure. 

Unfortunately, this approach erodes the right of public access. But this 
erosion is slight, entailing only a return to the pre-1975 judicial public interest exemptions. This amendment would limit judicial exemptions to situations 
where privacy is involved, rather than permit an exemption any time the public 
interest requires. It is difficult to decide where the personal right of privacy 
ought to yield to the public's right to know the workings of government. The authors propose that the Florida Legislature permit the courts to assist in 
making that decision. 

Beyond Balancing 

It is apparent from the holding in 
Fadjo that the Fifth Circuit will not countenance an impermissible statutory invasion of constitutionally protected privacy. Nonetheless, the Florida Legislature can go beyond the Fifth Circuit's balancing test and provide meaningful standards of judicial review while simultaneously accommodating the goals of public access and individual privacy. Rebutment of the definitional and access provisions of the Public Records Law would allow public access to government information, while assuring the individual citizen that private information would be free from public disclosure absent a compelling, countervailing public interest in disclosure. 

Enactment of these recommended proposals would allow the Florida Legislature to implement four desirable objectives. Modification of the present 
Florida Public Records Law would accomplish the first objective of preventing 
the statute from being declared an unconstitutional invasion of protected privacy. The second objective, accommodating the conflicting goals of public access and individual privacy, assures the fulfillment of the first objective. If the Florida Public Records Law provides a legitimate individual right to 
disclosure privacy, it will not be declared unconstitutional. The third objective is to provide legislative guidance and authority for the courts. The final objective allows the legislature to employ its greater capacities and resources for 
discerning public opinion and weighing competing interests in acting as an 
intermediary between the various branches of government and those whom they govern. 

The exemption for judicial balancing suggested previously does not take 
into account two of the three factors that determine the scope of the right 
access to government information. Modification in the definition and access 
provisions allows implementation of a statutory scheme which properly 
responds to both claims of public access and individual privacy made against the 
government by its citizens. 
The Uniform Information Practices Code (UIPC) provides the most 
comprehensive approach to reconciling the right of public access to government 
information with the individual's right to disclosural privacy. The Code's 
objective is to accommodate the two fundamental interests by establishing "a 

198. See A.S. Miller, supra note 9, at 17. The author makes the point that it is "only 
when the state itself does not feel threatened by assertions of privacy that constitutional law 
reflects a judicial desire to protect it." Id. The legislative exemptions in the Public Records 
Law also advance the interests of the state rather than the individual. 
201. Id. §6255. For a description of the balancing undertaken pursuant to application of the 
(1974). For an analysis of the judicial interpretation of the California Public Records Act, 
see Comment, supra note 188, at 56. 
204. This language is suggested by FREEDOM OF INFORMATION CLEARINGHOUSE, DRAFT OF 
MODEL LEGISLATURE STATE FREEDOM OF INFORMATION ACT (no date). 
205. Beaney, The Right to Privacy and American Law, 31 L & CONTEMP. PROB. 225, 209 
(1966). 
206. Id. 
207. See text accompanying note 128 supra. 
208. UNIFORM INFORMATION PRACTICES CODE (1969). The Code was approved and recom- mended for enactment in all states at the 89th annual A.B.A. conference, August 1, 1980. The 
ABA House of Delegates voted in February, 1981, to defer action until the individual state 
had examined the provisions. 8 FLA. B.J. 4 (1981).
broad right of public access to governmental records" which yields when the claim to individual privacy has "greater magnitude."

The Code definition of government record pertains to information maintained by an agency in written, aural, visual, electronic or other physical forms.151 The other critical definitions in Article 1 are found in sections 1-105(5) and 1-105(10) which deal with an individually identifiable record and a personal record. These provisions are important because they trigger the applicability of Article 3, which limits public access to information in government records about individuals. The test used to trigger the individual's right to privacy is objective: 1) does the record on its face identify the individual; and 2) can the requester identify the individual by known or readily available extrinsic facts. The test is disjunctive; if either criteria is met, the individual's file is presumed, in the absence of a specific exemption, a non-government record. Article 3 defines the specific limitations on public disclosure, allowing access only to individually identifiable information that does not constitute invasion of personal privacy upon disclosure.152 The only information that may be freely disclosed is primarily job related.153

The information may also be disclosed if taken from a public meeting or authorized by statute, court order, subpoena or on a showing of compelling circumstances.154 The provision, therefore, allows disclosure of job related information, information gathered in a public meeting, and information needed pursuant to law, but generally limits disclosure of personally identifiable information to the individual it pertains to or when it is not a "clearly unwarranted" privacy invasion.155 This is a balancing approach for case-by-case application.156 The criteria to use, and an elaboration of examples of unwarranted invasions, are contained in section 3-102.157

The information in which an individual has a significant privacy interest can be disclosed only when there is an assessment of the public need for the information rather than the interest of a particular requestor.158 This provision complements the concept of public access to public records by correctly restricting the public's access to private records held by the government. The statutory wording, "clearly unwarranted invasion of privacy," may appear imprecise, but the Comment to Article 3 provides ample justification for rejecting specific enumeration of protected privacy interests because privacy and access issues are seldom accorded such categorical treatment. The Comment opts, instead, for examples which allow for analogy and "regard to context."

The UIPC has an unwieldy format due to a bifurcated structure containing separate provisions for Freedom of Information159 and Disclosure of Personal Records.160 The differing interests identified and accommodated provide, nevertheless, an excellent model for modification of the Florida Public Records Law. The Code’s distinction between public and private records accommodates both a policy of access to governmental records and protection of individual privacy when the public interest in disclosure does not outweigh the privacy interest. Florida should enact definitions for government and personal records that assimilate the policies and distinctions of UIPC article 1 and article 3.

The scope of access may undergo continual refinement on a case-by-case basis, with adequate accommodation of the public and private interests evolving only after further delineation of the asserted claims and appropriate protections. The Code attempts to articulate legitimate public and private claims and, therefore, provides a model for consideration.

The access provisions of the UIPC are divided into two categories: public and inter-agency. Article 2, section 2-102, allows liberal access to governmental records subject to the specific limitations of section 2-103, which designates twelve categories of government information exempt from mandatory disclosure. Entire record systems are not exempt as such; only segregable sections of otherwise fully accessible government records are exempt from disclosure. The exemptions protect three important public interests, beginning with the effectiveness and integrity of certain essential governmental processes. This is


210. Id.

211. Id. §1-105, Comment. The Uniform Information Practices Code is in accord with the "formalities" rule announced in Byron v. Horace, 529 So. 2d 636 (1988). The Official Comment states that "the personal recollection of an agency employee would not be a 'government record' but his handwritten notes summarizing an event or conversation would." Uniform Information Practices Code §1-105, Comment (1980). The Comment further states that the definition of government record is "the key operative definition in Article 2 of the Code," triggering "the general public right of access to information established in §2-101 and §2-102." Id.

212. Uniform Information Practices Code §1-105(5) (1980) states: "Individually identifiable record means a personal record that identifies or can readily be associated with the identity of an individual to whom it pertains." The text of §1-105(5) reads: "Personal record means any item or collection of information in a government record which refers, in fact, to a particular individual, whether or not the information is maintained in individually identifiable form." Id. §1-105(5).

213. Id. §5-101, Comment. The Comment provides the underlying rationale for the structure of article 3.

214. Id. §5-101(1).

215. Id. §5-101(5)(10).

216. Interests. Disclosure of an individually identifiable record under this subsection, therefore, is permissible only if the public interest in disclosure outweighs the privacy interest of the individual. The initial judgment under the standard lies with the agency administrator. Ultimately, however, the courts, exercising de novo review, will determine the scope of this standard on a case-by-case basis. Uniform Information Practices Code §5-102, Comment (1980).

217. The Comment bases its support of this approach upon the premise that case-by-case determinations will, "ultimately produce a fairer and more refined accommodation of these
accomplished by exempting from mandatory disclosure certain law enforce-
ment and inter/intra-agency communications which are predecisional. These
deliberative communications are exempt from immediate, though not ultimate
disclosure. Exemptions in this category also protect the integrity of agency ad-
ministered licensing examinations as well as agency procurement and bidding
processes.

The exemption also protects public interest in the reliance of persons who
submit confidential information either voluntarily or under compulsion. The
Comment on this confidentiality exemption focuses on agency collection of
information necessary to effectively regulate business. The enumeration of
specific examples of justifiably confidential information, however, narrows con-
siderably the exemption’s broad language. This section demonstrates that an
agency, in order to fulfill its purposes in the public interest, may need to
withhold certain information.

Finally, the restrictions on public access to government records address the
individual’s interest in privacy. The important provisions are found in article
2, sections (a)(12), (b), and (c), which establish notice procedures. These pro-
cedures are triggered when a government agency makes a decision to disclose
information that may fall within an exemption. Under the notice provisions,
the decision to disclose is considered tentative until reasonable efforts are made
to inform the interested parties and provide them the opportunity to present
objections. The procedures ensure full agency appraisal of considerations
favoring non-disclosure before disclosure is made. Interested parties are those
who submitted the arguably exempt information or those who requested notice
of a possible disclosure prior to a request being made.

The exemptions must be read in light of the Code’s general segregation of
information principles which extend the exemptions only to categories of
information, thereby requiring the agency to delete all non-disclosure infor-
(continued on next page)
transfer between government agencies until a request for disclosure triggered the notice requirements of article 2, section 2-102.280 This deficiency can be remedied by a simple notice procedure which would accomplish two objectives: allow for disclosure of personal information between agencies only for valid governmental purposes, and inform the interested individual of which agencies hold personal information that would be subject to the limitations placed on public disclosure.

The UIPC provision on inter-agency confidentiality is commendable if the confidentiality presumption is limited to specified categories of government held information, such as the integrity of the competitive bidding process. This provision, if adopted, should consist only of statutorily enumerated exemptions. The individual agency should be given no discretion, for discretion promotes the withholding of information to which the public has a legitimate right of access. An inter-agency confidentiality exemption may require case-by-case adjudication before courts can develop cohesive standards that allow public access to government information.

With the modification suggested in the notice requirement, the UIPC provisions on access, establishing different standards for public and inter-agency disclosure, are recommended for consideration as a model. Because the proposed definitional and access modifications interact and complement each other, they constitute an acceptable accord between the conflicting objectives of public access and individual privacy which accommodates the values necessary for co-existence in a collection-oriented society.281

CONCLUSION

Contrary to the assumption of some proponents of privacy protection and advocates of information control, interests in privacy and access are not contradictory. They are, rather, complementary. Legislation safeguarding informational privacy registers the concern that privacy is in important ways related to individuals' decisions as to their self-government. Alternatively, legislation supporting the public's right to know through legal rights of access acknowledges that in a free society citizens must be informed about their government's decisions and practices. Therefore, the rights of privacy and access are actually political correlates: both involve the right of individuals to control information to their self-government.282

The conflict in Florida between personal privacy and the public's right to know can be resolved. At the very least, the Florida Legislature should adopt a general exemption to the public records law which recognizes the interest in

280. Id. §2-102.

281. T. Emerson, The System of Freedom of Expression §45 (1970). "Generally speaking, the concept of a right to privacy attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world. The right of privacy, in short, establishes an area excluded from the collective life, not governed by the rules of collective living." Id. See also Miller, Toward a Concept of Constitutional Duty, 1968 Surv. Ctr. Rev. 199.

282. O'Brien note 56, at 84.
July 20, 1987

Robert Aim
Chairman
Governor's Committee on Public Records
P.O. Box 541
Honolulu, HI 96809

Dear Robbie,

These two articles appeared in the July 8, 1987 issue of the Chronicle of Higher Education. Both address the privacy issue as it is involved in important aspects of campus affairs. I thought that they might be of interest to others.

Sincerely,

Ian Y. Lind
Colleges Should Restrict the Kinds of Off-Campus Jobs that Students

By Thomas V. DiBacco

One of the most significant changes in academia has been in student employment. Students now work in virtually every area of the university—answering phones in department offices, performing secretarial duties, working in the library, driving shuttle buses, taking visitors on tours, selling books in the campus store.

To be sure, student employment is not new. I worked during my college days in the 1950s, but then the chores were generally limited to those of dormitory adviser and cafeteria worker. Most other jobs on campus were held by permanent full-time employees.

Many students are employed under work-study, the federally supported system under which full-time students can earn money at their institutions. This program has been successful because it benefits both parties. Work-study support enables colleges and universities to employ students at the minimum wage, without providing fringe benefits. Institutions can even avoid paying the Social Security tax on student employees accrued no vacation time, sick leave, or rights to a permanent position, and they change so frequently that pay increases are rarely a factor.

Students benefit by being able to arrange their work according to their class schedules and personal preferences. They can chat with friends who call or visit them during work time, and are allowed to study on the job. They soon perceive that the likelihood of their being hired for poor performance or for excessive tardiness or absences is small. The worst that can happen is that they won’t get paid if they don’t show up.

The disadvantage to the institution of relying on student employees is the possibility of sloppy performance in areas too critical to be left to such risks. The work of faculty and staff members is subject to numerous reviews and evaluations, and its quality can suffer when students fail to answer phones, relay messages, or type an urgent letter, or are slow in shelving an important journal needed for research. Their privacy is also threatened. A student secretary or receptionist may have access to sensitive files, for example, or a student messenger from the dean’s office may correctly suppose that a series of envelopes marked “confidential” signals a personnel problem.

What is worse, perhaps, is the possible long-term effect on students’ future employment. If they have gotten away with mediocre performance in their campus jobs, students may carry over a blase approach to jobs after college. Such an attitude cannot help but hold back even those who have gained substantive knowledge during the course of their four years in college.

College administrators and faculty members are no more inclined than anyone else to look gift horses in the mouth. They seldom complain about students who are lazy or inefficient, or who otherwise don’t measure up. After all, no other choice would be the institution unless it means of the total budget. They also recognize that this works to by definitions, bound to make mistakes, and they usually treat their students’ shortcomings with sensitivity and tolerance.

In the classroom, a student’s poor performance prejudices only him; but, in the academic world, however, it can adversely affect the operation of the whole institution.

I am not suggesting that colleges stop employing students. I simply think students should not have jobs in areas where they can interrupt the serious work of faculty and staff members. Instead, they should be allowed to work only in primarily student areas, such as dormitories and cafeterias. If the other students complain about services performed by student employees, adult supervisors can see that the work improves. On the other hand, if their peers are tolerant of inadequate performance, only student services, not academic operations, will suffer.

Of course, those jobs are likely to be less prestigious and more routine, even unattractive, than the ones students currently hold. But such work provides a valuable educational lesson. I reprimand my own students of Horatio Alger’s youthful heroes, who all started at the bottom doing work that was tedious but—in Alger’s words—“spectable.” Only after such an apprenticeship can young people aspire to more responsible positions.

Thomas V. DiBacco is a professor of business at American University.
It's Possible to Conduct Tenure Evaluations Openly and Not Lose Reviewers' Candor or Faculty Quality

By Christine Mainland

The lawsuit over the University of California's confidential review process has led to renewed debate in academia about access to personnel files. At that university, and at many other higher-education institutions, faculty members being evaluated for promotion or tenure are not allowed to see their files. They are given summaries of reviewers' comments instead.

The six faculty members in the "Open Files" case, as it is called, claim that the university's policy violates their constitutional rights. The administration, on the other hand, argues that the confidentiality insured by closed files is essential. Its position is that a high-quality faculty depends on honest (and therefore sometimes unfavorable) reviews, and that reviewers who make negative recommendations must be protected from potential lawsuits by disappointed candidates.

That the evaluation process can be open without any risk to faculty quality or threat to reviewers has been clearly demonstrated at California State University. Faculty members at its 19 campuses have access to all material used in making promotion or tenure decisions, and are given an opportunity to respond to anything in their files. Under the system at Cal State, candidates must be notified beforehand of the criteria used and the procedures followed in evaluations. Each review committee and administrator must make a written recommendation, and the candidate, who receives a copy, then has time to challenge anything in the file before it goes to the next level. All recommendations for or against a candidate must be based on the material in the file, and the campus president, who makes the final decision, must put it in writing and include the reasons.

Reviewers' comments are not always favorable, external reviewers write negative assessments, and review committees and administrators make negative recommendations. Open files have meant that the faculty members whose careers are at stake can see the reasons and supporting evidence for the institution's decision on their candidacy.

In recent years, attempts by the presidents of some of the campuses to increase the requirements for research and publication have led to a number of grievances.

At Cal State, the procedures for resolving disputes over denials of tenure or promotion include binding arbitration. In general, arbitrators uphold a president's decision to deny promotion or tenure when there is no procedural error and the review committees and administrators have properly considered the material in the candidate's file. Where there is clear evidence of error in an evaluation, the arbitrator usually returns the case to the campus for reevaluation. An arbitrator can grant promotion or tenure only in "extreme cases" when the president has not exercised "reasoned judgment."

Open files protect faculty members' rights. For example, review committees or administrators sometimes ignore documentation, or make honest mistakes in their interpretation of facts. Since candidates have access to their files, they can point out omissions and correct errors early in the evaluation process. In one case that was arbitrated, a faculty member was denied promotion after he

An open files system also helps prevent discrimination. For example, women and members of minority groups sometimes receive negative recommendations in spite of being well qualified for promotion or tenure. With an open-file policy, such a candidate can demonstrate that he or she has clearly met the criteria and compares favorably with other candidates who have been granted tenure or promotion.

In short, quality and due process can coexist. An open-files system does not guarantee positive ratings for all candidates, regardless of merit. It simply guarantees that evaluations are not anonymous, that people who receive negative ratings know why.

Christine Mainland is a grievance-arbitration specialist for the California Faculty Association, faculty bargaining agent in the California State University System.
MEMORANDUM

TO: John Farias
Chairman, Board of Agriculture

FROM: Leo B. Young
Deputy Attorney General

SUBJECT: Release of Information; Kauai Task Force


I believe the same considerations and results as expressed in these memoranda apply to Mr. Morita's request for information on the Kauai Task Force.

Furthermore, the Federal Freedom of Information Act, 5 U.S.C.A. § 552 (1977) would appear to specifically exempt from disclosure Mr. Morita's request for information on individual delinquent accounts.

5 U.S.C.A. § 552(b)(4):

"trade secrets and commercial or financial information obtained from a person and privileged or confidential."

If the names of the individual borrowers are public information, i.e., because loan approvals are given in public meetings of the task force, Mr. Morita should be asked to first obtain the written consent of the individual borrower before releasing any information.

LEO B. YOUNG
Deputy Attorney General

LBY/ejk

Attach.
February 5, 1979

LEGAL MEMORANDUM

TO: Mr. Hideto Kono
   Director of Planning and
   Economic Development

FROM: Maurice S. Kato
      Deputy Attorney General

SUBJECT: Release of Information on the Large Fishing Vessel Loan Program

By memorandum dated January 23, 1979, you requested our review of three reports prepared by DPED on the
Large Fishing Vessel Purchase, Construction, Renovation, Maintenance, and Repair Loan Program under part II of
chapter 189, Hawaii Revised Statutes. You requested our
determination of whether those three reports were "public
records" within the meaning of section 92-50, Hawaii
Revised Statutes, because Senator T. C. Yim, Chairman of
the Senate Committee on Economic Development and Energy
and Natural Resources had requested information on the loans,
including borrowers' names, amounts, and status of repayment.
By telephone call on February 5, 1979, Ms. Doreen Shishido
of your Department informed us that an answer to your request
was required immediately because Senator Yim has required an
immediate reply.

Section 92-50 defines "public record" 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.
We believe that the three reports are not "public records" within the definition of section 92-50. All three reports are on the status of the outstanding loans and are prepared only for the purpose of internal management of the accounts. No "entry has been made or is required to be made by law" in or on these reports. No public officer or employee "has received or is required to receive for filing" any of the reports per se under any law of this State.

On the other hand, we understand that the information contained in the "Highlight - Comparison Report, Large Fishing Vessel Loan Program" is actually a matter of public record because the information on balances outstanding, total amount collected, collection increase by percentage over previous years, number of loans outstanding, and delinquent percentage was included in DPED's annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives submitted pursuant to section 189-26, Hawaii Revised Statutes. Therefore, there appears to be no problem with releasing that "Highlight," which is in essence an excerpt from a public report.

The other two reports, the "Comparison Report, Large Fishing Vessel Loan Program," and the "Department of Planning and Economic Development Large Fishing Vessel Loan Program Contractual Delinquency Report, December 31, 1976," contain identifying information (the loan numbers, the names of the borrowers, and the dates of the loans), the amounts and balances, and the status of repayment (whether current or delinquent). We believe that these reports may invade the right of privacy of the individual, since the status of repayment without further explanation of the circumstances causing the delinquency may unfairly and adversely affect the reputation of the borrowers. However, these reports also do contain more detailed information on the outstanding loans than does the "Highlight" and may be of greater value to Senator Yim in assessing the progress of the loan program.

Since Senator Yim is the Chairman of the Senate Committee on Economic Development and Energy and Natural Resources, you may understandably wish to provide him with more information than that released to the general public. We believe that the two detailed reports may be released to Senator Yim if the identifying information - the loan numbers, borrowers' names, and dates of loans - is first deleted to preserve the privacy of the individual borrowers.

[Signature]
Maurice S. Kato
Deputy Attorney General

MSK/Lmb
MEMO: September 22, 1978

TO: Honorable John Farias, Jr.
Chairman, Board of Agriculture

FROM: Leo B. Young
Deputy Attorney General

RE: Confidentiality of Animal Records
at the Quarantine Station

This is in reply to your request dated May 3, 1978 for legal guidelines to establish a policy on the confidentiality of animal records.

Although each request for inspection of the animal records must be individually considered, our general conclusion is that the animal records are not confidential and disclosure should be made unless specific exemptions are met.

Attorney General Opinion No. 76-3 dated April 19, 1976 provides the basic guidelines to determine what records are required by law to be available for public inspection:

Each request for disclosure must be determined upon the specific circumstances involved ....

The determination of what records are available for public inspection involves the interpretation of Sections 92-50 and 92-51, HRS. Under Section 92-51, "public records" must be made available for public inspection.
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 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. Any document falling within the aforesaid definition is subject to public inspection unless the document comes within certain exceptions. These exceptions are as follows:

1. Section 92-50, HRS, excepts any records which invade the right of privacy of an individual.

2. Section 92-51 excepts public records which may not be inspected under federal law.

3. Further, Section 92-51* excepts records which the attorney general in his discretion may withhold 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* may be a party unless such records are "open" under any rule of court.

4. Further, Section 92-51* excepts 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.

5. Finally, Section 92-51 excepts records whose inspections are prohibited by any other state law. (Emphasis added.) [*Reflects changes from original text.]

Legislative history of the original statute (formerly HRS § 92-1(2) and § 92-4 and identically re-enacted as part of Act 166, S.L.H. 1975 (Sunshine Law)) provides further guidelines:

It is not intended that this Bill modify any common law or statutory privilege which
exists by reason of a confidential relationship, such as exists, for example, between doctor and patient, husband and wife, and attorney and client. Standing Committee Report 135, Senate Journal, Regular Session 1959.

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, 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. Standing Committee Report 595, House Journal 1959.

The applicable statutes for the quarantine of domestic animals require only that certain general information be maintained. These statutory authorities are as follows:

§142-1, HRS Information and statistics. The department of agriculture shall gather, compile, and tabulate, from time to time information and statistics concerning domestic animals in the State, their protection and use, inquire into and report upon the causes of contagious, infectious and communicable diseases among them, and the means for the prevention, suppression, and cure of the same.

§142-2, HRS Rules and regulations. Subject to chapter 91 the department of agriculture may make and amend rules and regulations, for the inspection, quarantine, disinfection, or destruction, either upon introduction into the State, or at any time or place within the State, of animals and the premises and effects used in connection with such animals.

§142-6, HRS Quarantine. The department of agriculture may quarantine any domestic animal known to be affected with or to have been
exposed to any contagious, infectious, or communicable disease, and destroy the same, when in the opinion of the department, such measure is necessary to prevent the spread of the disease, and provide for the proper disposition of its hide and carcass; and disinfect premises where the disease may have existed.


Exemptions to public inspection are as follows:
Right of Privacy; Federal Prohibitions; Discretion of Attorneys; and Protection of Character and Reputation. Discussion of these exemptions are as follows:

Right of Privacy

The determination of which records, if made available for public inspection, would invade the right of privacy of an individual is a difficult task and there are no clear cut legal guidelines to follow.

Various definitions or explanations of the right of privacy have been made. Some of these are as follows:

1. The right to be free from the unwarranted appropriation or exploitation of one’s personality;

2. The publicizing of one’s private affairs with which the public has no legitimate concern;

3. The wrongful intrusion into one’s private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities;

4. The right to be let alone, to be free from unwarranted publicity, and to live without unwarranted
interference by the public in matters with which the public is not necessarily concerned;

5. Dean Prosser's four forms of invasion of privacy:

a. intrusion upon one's seclusion or solitude, or into his private affairs;
b. public disclosure of embarrassing private facts;
c. publicity which places one in a false light in the public eye; and
d. appropriation, for one's advantage, of one's name or likeness. 62 Am.Jur.2d Privacy § 1 (1972).

The standard of measurement of the right of privacy is as follows:

[R]ight of privacy is relative to the custom of time and place, and it is determined by the norm of the ordinary man. ... Protection must be restricted to ordinary or reasonable sensibilities, and does not extend to super-sensitivities ... . Some intrusion into one's private sphere are inevitable concomitants of life in an industrial and densely populated society ... . In order to constitute an invasion of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and inquiry to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant, ... . 62 Am. Jur.2d Privacy § 13 (1972).

It is our opinion that a balancing of interests test, as applied in certain federal courts, must be made.

The comparable right of privacy exemption under the federal Freedom of Information Act, 5 U.S.C. § 552 (1977) provides:

(6) personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
In Ditlow v. Schultz, 517 F.2d 166 (D.C. Cir. 1975), the federal court presented the following considerations:

1. The balancing of privacy lost versus public interest purpose;

2. "Whether the balancing is to be performed in the context of unrestricted disclosure to the public or of an unspecified release confined to the requesting parties;" (Id., at 171);

3. The weight to be given to the expectation of privacy absent a governmental assurance of confidentiality;

4. Whether the public interest purpose must relate to the evaluation of the performance of the government;

5. Whether other sources of information might suffice.


In Hawaii, the unauthorized use of a person's name and a picture of his house in a commercial advertisement is sufficient for a cause of action for invasion of privacy. Fergerstrom v. Hawaiian Ocean View, 50 H. 374 (1968).

This office has received forms AQS 2 (which is referred to in AQS 13), 13, and 14. The information requested and submitted to the Department meets the definition of a public record "which any public officer or employee
has received or is required to receive for filing."
However, because the applicable statutes and regulations
do not require specific entries, this office cannot deter-
mine that the forms are not public records open for in-
spection because the information would invade a person's
right of privacy. Whether the information provided on
the form would, in fact, violate the right of privacy
must be individually determined. This is especially
ture for AQS Card 14 that allows space for written comments.

Federal Prohibition

We are unaware of any federal law that would prohibit
the public inspection of AQS forms 2, 13, and 14.

Discretion by Attorneys

Whenever the Department is aware of an action or
proceeding, before or after commencement, that may involve
the State or county, records pertinent to such action or
proceeding should not be disclosed prior to allowing the
Attorney General or the responsible attorney for the county,
as the case may be, the opportunity to impose their
discretionary authority to withhold public inspection of
such records. This discretionary authority may be exer-
cised only after the records to be withheld from public
inspection are forwarded to the appropriate attorney for
use in preparing for the prosecution or defense of an
action or proceeding.

Protection of Character and Reputation

Public records that are not related to a matter in
violation of law and are deemed necessary for the protection
of a character or reputation of a person need not be
made available for public inspection. The guidelines to
determine when "protection" is necessary is found in
the laws pertaining to libel.

"Libel is a malicious publication tending
to blacken the memory of one who is dead or
the reputation of one alive and to expose to
public hatred, contempt or ridicule." 50
"Libel affecting the character of private persons are classified according to their objects: (1) libels which impute to a person the commission of a crime (2) libels which have a tendency to injure him in his office, profession, calling, or trade (3) libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man." Newell, Slander and Libel, at 72 (3d ed.), cited in Kahanamoku v. Advertiser, 25 H. 701 (1920).

In an action for libel truth of the matter is a complete defense. Kahanamoku, supra; and Wright v. Hilo Tribune-Herald, Ltd., 31 H. 128 (1929). However, in determining whether the record should be made available for public inspection, truth is not an appropriate criteria. It is not necessary that public inspection of the record be a libelous act in order to establish that protection of a person's character or reputation is deemed necessary. The legality of withholding records from public inspection should require something less than a finding of libel.

Recommendation

It is recommended that the following be included on AQS Form 2.

"Notice: State law (Hawaii Revised Statutes sections 92-50 and 92-51) may require that the information provided on Animal Quarantine Station forms 2, 13, and 14 be made available for public inspection by any person."

Not unlike the law of obscenity, the balancing of the public versus the individual's interests precludes us from providing clear guidelines for simple implementation of the laws. Should you have any questions, please feel free to contact me.

[Signature]
Leo B. Young
Deputy Attorney General
Robert Alm  
Chairman  
Governor's Committee on Public Records & Privacy  
P.O. Box 541  
Honolulu, HI 96809

Dear Mr. Alm,

Enclosed is an article on computers and privacy from the Wall Street Journal of August 20, 1987. It may be too late to do much good, but I thought that it was quite timely.

Sincerely,

Ian Y. Lind
Abusive Computers

As Government Keeps More Tabs on People, False Accusations Rise

With Data Bases Multiplying, Errors Get Hard to Trace; Bogus Marriage Records

Too Many 499-Pound Males

By Bob Davis

Staff Reporter of The Wall Street Journal

Curtis Arcenaux, a New Orleans sculptor, is afraid to travel to Mexico to meet his fiancee's grandparents. The reason: While crossing the border the past several years, he has been seized at gunpoint by U.S. police twice and jailed once.

The problem is that a federal computer mistakenly identifies Mr. Arcenaux as a fugitive because a real fugitive sometimes uses his name and Social Security number.

"I want to go across the border," the sculptor says. "But I have to consider, Is it worth facing machine guns again?"

"Government computer systems are constantly scouring billions of records kept on Americans to try to turn up fugitives, welfare cheats and other lawbreakers. The computers have an awesome power to track people's lives and discover when they lie by digging through dozens of different data banks and compiling what amount to electronic dossiers. But when people are falsely accused, their lives can become a nightmare. And critics say that the odds of that happening are increasing daily."

Less Free

"Every day an American wakes up, he or she is less free as far as public information is concerned," warns Rep. Don Edwards, a California Democrat who heads the House subcommittee on civil and constitutional rights. "Privacy is being invaded on a wholesale basis."

Ask Melba Henry. The Bronx mother of three young children was kicked off welfare for six weeks a few years back after a New York City computer system probing private bank records accused her of hiding a $1,942 bank account. She scurried from bank branch to bank branch—sometimes begging money from friends to feed her children—before discovering that the computer had turned up a savings account of an elderly neighbor. Ms. Henry had forgotten then, as a favor, she had agreed to be an additional signer on the neighbor's account so that she could make withdrawals for the neighbor in an emergency.

After the Legal Aid Society sued on Ms. Henry's behalf, New York City agreed to change some computer procedures. Still, she advises: "Try not to get caught in the same trap again. The computer system is not always right."

Untangling Errors

Computer information jumps so quickly from agency to agency that untangling an error can be very difficult. After running a match for delinquent student loans, the U.S. Education Department billed Frederick Harris, a San Jose, Calif., math teacher, for a $4.84 college loan. Mr. Harris assured the agency that he had never taken out a student loan. He said he was being confused with another man named Harris who had a different Social Security number, a different address and a different alma mater.

Nevertheless, in late 1985 the Education Department threatened to report the default to the Internal Revenue Service, which then could have seized Mr. Harris's tax refund. The department did send Mr. Harris's record to a private credit agency, from which resulted in his rejection for a car loan. Only after Rep. Edwards intervened for Mr. Harris did the department relent and admit its mistake. "You feel like David fighting Goliath knowing you left your stones back at the creek," Mr. Harris says.

Governments have been able to abuse record-keeping systems for a long time. Forty-five years ago, Nazis rounded up Jews by consulting handwritten municipal registries. But until recently, governments collected far more information than they could handle. Now that record-keeping is automated, agencies can run computer tapes crammed with personal records and compare the information for inconsistencies.

Desktop Computers

Computer matches by federal agencies have tripled since 1980, reports the Office of Technology Assessment, and state and local matches have grown even more rapidly. "On the state and local level, matches are being done every day," says J. Brian Hyland, the Labor Department's inspector general. Increasingly, police, social workers and bill collectors can use desktop computers to call up data banks. To find out more about their beneficiaries, state welfare agencies can check federal records on income, state information on wages, automobile registrations, student loans, veterans' benefits, old-age benefits and medical records. The Social Service System hunts for draft evaders by combing 100 computerized data banks. Once it even bought a computerized list of children who sent in coupons to Farrell's Ice Cream Parlor for free sundae on their birthday.

State and local food-stamp administrators can check among 248 data banks to catch overpayments. Customs agents search 13 law-enforcement data banks for information on drug suspects. Six state or city social-service agencies have checked computerized records of postal employees to see whether they improperly received welfare benefits—without uncovering a sin.

Please Turn to Page 10, Column 1
Abusive Computers: As Government Keeps Track Of People More Effectively, False Accusations Rise

Continued From First Page

Tennessee state auditor Frank Greathouse estimates that his state will have a state-of-the-art desktop system within two years. "We'd like to be able to switch from food-stamp records to veterans' benefits to see how eligibility records match up and then switch to welfare and elderly benefits to see how they fit in," he explains.

But an agency's findings are only as good as the data in the data banks. The Bronx Legal Aid Society says that it has defended 10 women who were threatened with a loss of welfare benefits after a computer search turned up marriage records falsely indicated that they had been married recently. In poor neighborhoods, Legal Aid lawyers say, illegal aliens seeking to avoid deportation often use stolen identification papers to fake marriages to U.S. citizens.

Such data put the aid recipient in a bind, though. City welfare officials want proof that a marriage license found during a computer match is bogus. But marriage registry officials often won't give the woman the document—arguing that she isn't allowed to report it if she isn't married.

Legal Aid says that it has won all the marriage-match cases it has appealed to state welfare authorities. It has no idea, though, how many women fail to challenge their aid cutoffs.

Allen Kraus, the deputy commissioner of income maintenance at the New York City Human Resources Administration, doesn't comment specifically on the marriage matches, but he praises computer matches for helping the city welfare agency dramatically reduce fraud.

Savings From Matches

On the federal level, Richard Kusserow, the inspector general for the Department of Health and Human Services, credits computer checks with uncovering welfare and food-stamp cheaters in Texas and California, among other places. David Greenberg, a University of Maryland economist who has studied computer matches, estimates that efficient welfare agencies can save $2 billion in overpayments on each dollar they spend on matches.

Nevertheless, Mr. Kusserow says, to avoid searching through records of millions of innocent people, agencies should limit their investigations to individuals who have applied for aid. Such screening, he adds, could create privacy problems, too, though it would encourage officials to develop computer systems that instantly check through a host of personal records. Few states have such quick access to personal files now; instead, they must send for computer tape that are frequently stored in different locations.

The Senate recently approved legislation sponsored by Sen. William Cohen, a Maine Republican, that would establish "data-integrity boards" within federal agencies to check computerized data for accuracy. Critics contend, though, that the bill doesn't go far enough. They propose instead an independent privacy commission that could restrict matches.

The U.S. now begins at age five, when, under a provision in the last year's tax-reform legislation, children claimed as dependents must apply for a Social Security number. That number, in effect, becomes a national identifier, the American Civil Liberties Union complains, enabling computers to find records about a child stowed in different data banks. "They're tracking from cradle to grave," says Jeri Wilburn, a Communications Workers of America official in San Angelo, Texas, who has refused to get his seven-year-old daughter, Amber, a Social Security number.

Artificial Intelligence

Computer tracking is getting a lot more sophisticated, too, as federal agencies spend heavily on artificial-intelligence research. One Federal Bureau of Investigation system, dubbed Big Floyd, plots relationships between people entered into a crime data bank and draws a graph of those relationships. Then it indicates whether the suspects seem to have violated labor-trade-union rules. The IRS says that it is working on a similar system.

But state-of-the-art computer systems have been humbled by false data and computer bugs. The IRS doesn't check the accuracy of the interest-income information it receives from banks and then provides to state welfare agencies for computer matches. Last year, however, Congress's General Accounting Office reported that 50 financial institutions sent the IRS inaccurate interest-income statements on one million taxpayers because of a software glitch.

No data bank has more sensitive information than the FBI's National Crime Information Center, which contains 19 million files on fugitives, stolen vehicles and criminals. Using the NCIC and local police computer records, a police officer who stops someone for speeding can check the motorist's name, license plate and other identifying information to see whether he is wanted for a crime. A mistake can lead to an unjustified arrest.

An advisory panel recently recommended vastly expanding the NCIC database so that police officials can track interesting people suspected of committing crimes and can consult individual Social Security and tax records. The FBI hasn't yet decided whether to accept these changes.

Overall, the FBI says, only about 5% of the most sensitive information now in the NCIC is incorrect or incomplete. But the accuracy of NCIC information, which comes largely from local police agencies, varies widely from state to state. In Alabama, for instance, an FBI audit in 1986 found that 13% of the information on wanted persons was wrong and that an additional 17% was dropped just before the audit. In Mobile, according to the audit, three-quarters of the wanted persons were listed as weighing 99 pounds or standing seven feet, 11 inches tall—the maximum entries for weight and height.

Role of 'Knucklehead'

The Mobile police department had a knucklehead adding information into the system, says Kier Boyd, the FBI's deputy assistant director for technical services. "He didn't think you had to hate anything in the system except names," Mr. Boyd adds, that the information has been corrected.

After being challenged in false-arrest suits, New Orleans and Los Angeles have revamped their police computer systems and procedures. In New Orleans, police arrested a woman even though she was 70 pounds lighter and six inches shorter than the woman described in the computer. In Los Angeles, a black man was arrested even though a white man was sought.

Mr. Arcenaux, the New Orleans sculptor, is mistaken for Daniel Wayne Frasier, who is wanted for parole violations. The two men look somewhat alike, and Mr. Frasier apparently obtained some of Mr. Arcenaux's records because he has used Mr. Arcenaux's name as an alias and his Social Security number for identification purposes.

To keep out of trouble, Mr. Arcenaux carries a letter from the Brownsville, Texas, district attorney's office describing his predicament and vouching that his fingerprints aren't the same as Mr. Frasier's. Mr. Arcenaux, who wears his hair in braids down to his belt and an earring in his nose, can hardly afford to seem any more suspicious to police. But if he changed his name and Social Security number, the new identifiers might well wind up in some computer as aliases for Mr. Frasier.

For now, Mr. Arcenaux keeps a low profile. He uses a pseudonym, Coco Robicheaux, for his art, and he avoids getting into government computers as much as possible: "I'm living like Daniel Wayne Frasier," he says. "I'm always on the lookout. It could be mistaken for this guy at any time."