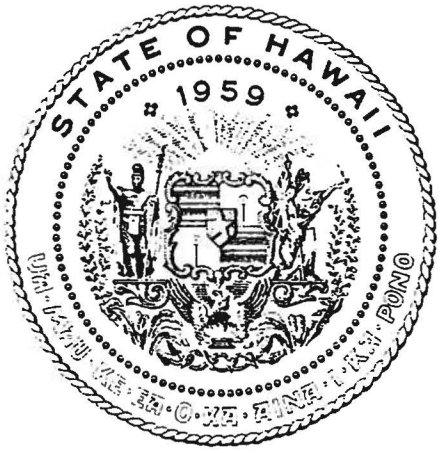

Report of the Governor's Committee on Public Records and Privacy

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

Volume IV
December 1987

OFFICE OF INFORMATION PRACTICES
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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 busines, 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

KEY TO SOURCES LISTED IN PART I

AG	Attorney General, State of Hawaii
BOE	Board of Education, State
CC1/CC3	Circuit Court, 1st/3rd Circuits
DCCA	Dept. of Commerce and Consumer Affairs, State
HawCC	Corporation Counsel, Hawaii County
HonCC	Corporation Counsel, Honolulu
HonED	Ethics Commission, Honolulu
HPD	Honolulu Police Department
MCC	Corporation Counsel, Maui County
NC	Neighborhood Commission, Honolulu
OCS	Office of Council Services, Honolulu
OMB	Ombudsman, State of Hawaii
Senate	State Senate
UH	University of Hawaii

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Accident.Reports	76/04/19	Investigation records re industrial safety not public	AG
Address	65/00/00	Employee address & phone number not public	HonCC
	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
Advisory	83/08/05	Advisory committee on pesticides exempt from Sunshine Law	1CC
	86/04/08	State Civil Defense Advisory Council exempt from "Sunshine"	AG
Agenda	78/03/13	Sunshine Law applies to Neighborhood Boards	HonCC
	79/08/27	Proper notice necessary for Council decision	HonCC
	81/01/02	Proper notice of meeting does not require access to documents	MCC
	82/03/16	UH appointment not violation of sunshine	AG
	84/01/11	UH Regents cannot publish salaries of University employees	AG
	84/05/24	Issue of "hand-carried" additions to agenda reviewed	OCS
	84/07/25	Limits on additions to published agenda reviewed	HonCC
	84/10/02	Defects in agenda not sufficient to make meeting illegal	MCC
	84/12/18	Sunshine law applies to items arising out of report	HonCC
	85/02/04	"New" and "Unfinished" business should be detailed on agenda	AG
Agent	86/05/12	Written authorization required for release of personal information	HonCC
Agriculture	78/09/22	Animal records of the Quarantine Station are public records	AG
	79/02/27	Information on loans made by state task force is confidential	AG
Ambulance	76/04/28	Ambulance statistical reports confidential	HonCC
	85/10/18	Emergency ambulance service logs personal records	HonCC
Animal	78/09/22	Animal records of the Quarantine Station are public records	AG
Annual.Report	78/00/00	Annual report of private vocational school open	OMB
Applications	46/00/00	Liquor Commission records open	HonCC
	75/07/25	Movie operator's license application not public	AG
	82/05/21	Names of job applicants not public	BOE
	86/04/28	List of applicants for City housing development confidential	HonCC
Apprenticeship	86/05/12	State law prohibits release of individual data to federal agency	AG
ASUH	81/12/07	ASUH and other student organizations not subject to sunshine	AG
	85/09/06	ASUH held not subject to Sunshine Law	

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Attorney.General	86/04/29	Working files of the Attorney General are not public records	AG
Auction	78/05/31	Auctioneer's records open to public	HonCC
Audit	86/05/12	Audit of Broadcasting Agency not available for copying	DCCA
Auto.Registration	79/05/22	Motor vehicle registration data not public	AG
	79/10/26	Auto registration info not public record	HonCC
Autopsy	61/00/00	Autopsy reports are public records	HonCC
Bids	82/00/00	Bid information confidential until opening	OMB
		Amount of successful bid public	OMB
	84/04/12	Proposals are public records unless containing exempt data	HonCC
Board	75/07/11	Sunshine Law requirements reviewed for city agencies	HonCC
	86/02/10	Amended Sunshine Law requires opportunity to testify	AG
Board.of.Education	75/09/30	Meeting to develop job description cannot be closed	AG
	82/05/21	Names of job applicants not public	BOE
Boards	76/06/25	Board of Water Supply records subject to disclosure under Sunshine Law	MCC
	85/09/06	ASUH held not subject to Sunshine Law	
	85/09/17	All Hawaii County boards allow for public testimony	HawCC
	86/04/08	State Civil Defense Advisory Council exempt from "Sunshine"	AG
Budget	82/00/00	Court refused to rule on closed legislative meeting	CC1
	83/00/00	Legislature's detailed budget worksheets not public records	CC1
Building.Dept	80/00/00	Building plans ordered released to public	CC1
	80/08/27	Computer tapes with zoning data are public	HonCC
Building.Plans	73/04/04	Building plans private until approved	HonCC
	83/10/12	Building plans not public prior to permit	HonCC
Cabinet	75/10/17	Governor's cabinet meetings exempt from sunshine	AG
Catch.Reports	78/00/00	Monthly catch reports are public records	OMB
Cease.and.Desist	77/07/08	Certain DOE licensing records confidential	AG
Chance.Meetings	85/10/09	Informal meetings cannot relate to official business	MCC

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
City.Clerk	77/00/00	Voter information public when filed with Clerk	OMB
Civil.Defense	86/04/08	State Civil Defense Advisory Council exempt from "Sunshine"	AG
Civil.Service	58/00/00	Civil Service lists/exam records public	HonCC
		Civil Service ratings are public records	HonCC
	75/06/19	Adjudicatory functions of Civil Service Commission exempt from sunshine	HawCC
	76/08/11	Civil Service Commission meeting on procedures open	HonCC
	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC
Clerk	53/00/00	Letters are public records when filed	HonCC
Commission	85/02/04	"New" and "Unfinished" business should be detailed on agenda	AG
Committee	80/05/23	A county council standing committee is governed by Sunshine Law	MCC
	85/11/27	Committees of UH Board of Regents must comply with Sunshine Law	AG
Committee.Report	80/00/00	Community group provided legislative report info after filing suit	CC1
Complaint	83/12/08	Transcript of fact finding hearings not public	HonCC
Computer.Tapes	76/04/28	Ambulance statistical reports confidential	HonCC
	80/08/27	Computer tapes with zoning data are public	HonCC
Condominium	73/04/04	Building plans private until approved	HonCC
	80/00/00	Building plans ordered released to public	CC1
Conduct	75/10/22	Disorderly persons can be removed from hearing	HonCC
Consultants	78/02/14	Ethics violators cannot be publicly named	HonCC
Continued.Meeting	80/07/10	Public notice must be given of meeting recessed to unspecified date	MCC
Contracts	70/00/00	Payroll affidavits of contractor not public	OMB
	82/00/00	Bid information confidential until opening	OMB
		Amount of successful bid public	OMB
	84/01/30	DSSH contract proposals public record	AG
	84/04/12	Proposals are public records unless containing exempt data	HonCC
	85/11/25	Payroll records of city contractor not public	HonCC
Copies	81/00/00	General Excise Tax applications public	OMB
	82/00/00	Cost of copies must be "reasonable"	OMB
	86/05/12	Audit of Broadcasting Agency not available for copying	OCCA
County.Council	76/08/10	Council's "special investigation" public	HonCC

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	77/00/00	Meeting to discuss labor negotions must be open	CC3
	78/11/20	Meeting of Council members-elect not public	HonCC
	79/02/20	County Council does not have to make tape or transcript of meetings	MCC
	79/08/27	Proper notice necessary for Council decision	HonCC
	80/05/23	A county council standing committee is governed by Sunshine Law	MCC
	80/05/25	Sunshine violations not ethics matter	HonEC
	80/07/10	Public notice must be given of meeting recessed to unspecified date	MCC
	81/01/02	Proper notice of meeting does not require access to documents	MCC
	83/01/20	Meeting to consult nonlegal staff must be open	HonCC
	83/12/01	Proposed amendment would allow counties to supercede Sunshine Law	MCC
	84/03/08	A meeting qualifies for Ch.92 treatment when convened.	OCS
	84/07/25	Limits on additions to published agenda reviewed	HonCC
	85/08/29	Public testimony can be restricted to committee meetings	MCC
	85/09/27	Informational meeting not subject to Sunshine Law	MCC
	85/10/09	Informal meetings cannot relate to official business	MCC
	85/10/15	Public testimony provision applies to County Council meetings	HawCC
	86/01/21	Each "reading" before Council must occur at separate meeting	HawCC
	86/02/10	Amended Sunshine Law requires opportunity to testify	AG
DAGS	76/00/00	State government directory available w/o written request	OMB
DCCA	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
Dept.of.Health	83/08/05	Advisory committee on pesticides exempt from Sunshine Law	1CC
Directory	76/00/00	State government directory available w/o written request	OMB
DLNR	78/00/00	Monthly catch reports are public records	OMB
Doctors	80/00/00	Names and Medicaid income of doctors public	OMB
Documents	53/00/00	Letters are public records when filed	HonCC
DPED	79/02/05	Information on status of loans is confidential	AG
Education	78/00/00	Annual report of private vocational school open	OMB
	85/09/06	ASUH held not subject to Sunshine Law	
Education.Dept	77/07/08	Certain DOE licensing records confidential	AG
	78/00/00	Annual report of private vocational school open	OMB
Election	77/00/00	Voter information public when filed with Clerk	OMB
Employee	65/00/00	Employee address & phone number not public	HonCC

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	72/09/11	City pay records not public	HonCC
	78/10/12	Information in personnel files confidential	AG
	82/05/21	Names of job applicants not public	BOE
	82/05/24	Names of University job applicants private	UH
	86/05/12	Written authorization required for release of personal information	HonCC
Employment.Records	58/00/00	Civil Service lists/exam records public	HonCC
Enforcement	80/05/25	Sunshine violations not ethics matter	HonEC
Ethics	71/00/00	Prohibition on disclosure of information held unconstitutional	CC3
	78/02/14	Ethics violators cannot be publicly named	HonCC
	80/05/25	Sunshine violations not ethics matter	HonEC
	86/07/02	Meaning of "executive session" reviewed	HonEC
Excise.Tax	81/00/00	General Excise Tax applications public	OMB
Executive.Session	76/08/10	Council's "special investigation" public	HonCC
	77/00/00	Meeting to discuss labor negotions must be open	CC3
	83/01/20	Meeting to consult nonlegal staff must be open	HonCC
	86/07/02	Meaning of "executive session" reviewed	HonEC
Exemptions	75/06/19	Adjudicatory functions of Civil Service Commission exempt from sunshine	HawCC
	83/12/01	Proposed amendment would allow counties to supercede Sunshine Law	MCC
Fact.Finding	83/12/08	Transcript of fact finding hearings not public	HonCC
Fees	82/00/00	Cost of copies must be "reasonable"	OMB
Financial.Data	79/02/27	Information on loans made by state task force is confidential	AG
Financial.Disclosure	78/02/14	Ethics violators cannot be publicly named	HonCC
Findings	86/08/00	Findings of Labor Department investigation should be public	CC1
Fishing	78/00/00	Monthly catch reports are public records	OMB
	79/02/05	Information on status of loans is confidential	AG
Guidelines	75/07/09	Guidelines for implementation of Sunshine Law	AG
	85/02/13	Updated Sunshine Law guidelines for City agencies	HonCC
Guns	85/01/21	List of persons with gun permits confidential	HPD
Hand.Carried	84/05/24	Issue of "hand-carried" additions to agenda reviewed	UCS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	84/07/25	Limits on additions to published agenda reviewed	HonCC
Hawaii.County	80/00/00	Minutes must be available within 30 days	OMB
Health	72/00/00	Mental health records available to patient	OMB
	78/00/00	Health records available to patient	OMB
Health.Dept	77/00/00	Vital records available for research	OMB
	79/00/00	Inter- and intra-office memos, telephone logs public	CC1
	82/00/00	Amount of successful bid public	OMB
	83/00/00	Dept of Health advisory committee not covered by Sunshine Law	CC1
Hearings	75/08/27	General notice of hearing adequate	HonCC
	75/10/22	Disorderly persons can be removed from hearing	HonCC
	83/12/08	Transcript of fact finding hearings not public	HonCC
Income	80/00/00	Names and Medicaid income of doctors public	OMB
Industrial.Accident	76/04/19	Investigation records re industrial safety not public	AG
Informal.Meetings	78/11/20	Meeting of Council members-elect not public	HonCC
	85/10/09	Informal meetings cannot relate to official business	MCC
Informational.Meeting	85/09/27	Informational meeting not subject to Sunshine Law	MCC
Inmate.List	74/00/00	List of prison residents a public record	OMB
Inspection	86/05/12	Audit of Broadcasting Agency not available for copying	DCCA
Intent	75/07/11	Sunshine Law requirements reviewed for city agencies	HonCC
Investigation	74/00/00	Report of police investigation confidential	OMB
	76/08/10	Council's "special investigation" public	HonCC
	82/11/23	Challenge to voter registration not public	HonCC
	86/08/00	Findings of Labor Department investigation should be public	CC1
Job.Description	75/09/30	Meeting to develop job description cannot be closed	AG
Labor.Dept	86/05/12	State law prohibits release of individual data to federal agency	AG
	86/08/00	Findings of Labor Department investigation should be public	CC1
Legislature	80/00/00	Community group provided legislative report info after filing suit	CC1
	82/00/00	Court refused to rule on closed legislative meeting	CC1

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	83/00/00	Legislature's detailed budget worksheets not public records	CC1
	83/12/01	Proposed amendment would allow counties to supercede Sunshine Law	MCC
Letters	53/00/00	Letters are public records when filed	HonCC
Licenses	46/00/00	Liquor Commission records open	HonCC
	75/07/25	Movie operator's license application not public	AG
	77/07/08	Certain DOE licensing records confidential	AG
	77/11/30	Certain records of Liquor Commission are public	HonCC
	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
Liquor.Commission	46/00/00	Liquor Commission records open	HonCC
	77/11/30	Certain records of Liquor Commission are public	HonCC
Loans	79/02/05	Information on status of loans is confidential	AG
	79/02/27	Information on loans made by state task force is confidential	AG
Maui	72/01/26	County records must be made available for public inspection	MCC
	80/05/23	A county council standing committee is governed by Sunshine Law	MCC
	80/07/10	Public notice must be given of meeting recessed to unspecified date	MCC
	84/10/02	Defects in agenda not sufficient to make meeting illegal	MCC
	85/08/29	Public testimony can be restricted to committee meetings	MCC
	85/10/09	Informal meetings cannot relate to official business	MCC
Medicaid	80/00/00	Names and Medicaid income of doctors public	OMB
Medical.Examiner	61/00/00	Autopsy reports are public records	HonCC
Medical.Records	72/00/00	Mental health records available to patient	OMB
	78/00/00	Health records available to patient	OMB
Medical.Reports	76/04/28	Ambulance statistical reports confidential	HonCC
Meeting	80/05/23	A county council standing committee is governed by Sunshine Law	MCC
Meetings	71/00/00	Prohibition on disclosure of information held unconstitutional	CC3
	75/06/19	Adjudicatory functions of Civil Service Commission exempt from sunshine	HawCC
	75/07/11	Sunshine Law requirements reviewed for city agencies	HonCC
	75/09/30	Meeting to develop job description cannot be closed	AG
	75/10/17	Governor's cabinet meetings exempt from sunshine	AG

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	75/10/22	Disorderly persons can be removed from hearing	HonCC
	76/00/00	20-day notice required for hearing on rules	OMB
	76/08/10	Council's "special investigation" public	HonCC
	76/08/11	Civil Service Commission meeting on procedures open	HonCC
	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC
	78/03/13	Sunshine Law applies to Neighborhood Boards	HonCC
	78/11/20	Meeting of Council members-elect not public	HonCC
	79/07/28	Sunshine Law applies to orientation session of Board Regents	Senate
	79/08/27	Proper notice necessary for Council decision	HonCC
	80/00/00	Minutes must be available within 30 days	OMB
	80/07/10	Public notice must be given of meeting recessed to unspecified date	MCC
	81/01/02	Proper notice of meeting does not require access to documents	MCC
	81/01/14	30-day limit for production of minutes not mandatory	MCC
	82/00/00	Court refused to rule on closed legislative meeting	CC1
	82/03/16	UH appointment not violation of sunshine	AG
	83/01/20	Meeting to consult nonlegal staff must be open	HonCC
	83/06/08	Employment interviews may be closed	HonCC
	83/12/01	Proposed amendment would allow counties to supercede Sunshine Law	MCC
	84/03/08	A meeting qualifies for Ch.92 treatment when convened.	OCS
	84/04/10	A quorum must be present to conduct official business	HonCC
	84/05/24	Issue of "hand-carried" additions to agenda reviewed	OCS
	84/07/25	Limits on additions to published agenda reviewed	HonCC
	84/10/02	Defects in agenda not sufficient to make meeting illegal	MCC
	84/12/18	Sunshine law applies to items arising out of report	HonCC
	85/02/04	"New" and "Unfinished" business should be detailed on agenda	AG
	85/08/09	Police Commission does not need rule on public testimony	HawCC
	85/08/29	Public testimony can be restricted to committee meetings	MCC
	85/09/06	ASUH held not subject to Sunshine Law	
	85/09/17	All Hawaii County boards allow for public testimony	HawCC
	85/09/27	Informational meeting not subject to Sunshine Law	MCC
	85/10/09	Informal meetings cannot relate to official business	MCC
	86/02/25	Voting by proxy or telephone prohibited	HonCC
	86/04/08	State Civil Defense Advisory Council exempt from "Sunshine"	AG
Memorandums	79/00/00	Inter- and intra-office memos, telephone logs public	CC1

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Mental.Health	72/00/00	Mental health records available to patient	OMB
Minutes	71/00/00	Duplication of tape-recorded minutes allowed	OMB
	79/02/20	County Council does not have to make tape or transcript of meetings	MCC
	80/00/00	Minutes must be available within 30 days	OMB
	80/05/23	A county council standing committee is governed by Sunshine Law	MCC
	81/01/14	30-day limit for production of minutes not mandatory	MCC
	83/12/28	No right of access to tape recording of meeting	NC
	85/02/04	"New" and "Unfinished" business should be detailed on agenda	AG
Motion.Picture	75/07/25	Movie operator's license application not public	AG
Motor.Vehicle	79/10/26	Auto registration info not public record	HonCC
Names	74/00/00	List of prison residents a public record	OMB
	76/02/14	Ethics violators cannot be publicly named	HonCC
	80/00/00	Names and Medicaid income of doctors public	OMB
	82/05/21	Names of job applicants not public	BOE
	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
	85/01/29	Privacy prevents release of names of disciplined police officers	HonCC
Neighborhood.Board	78/03/13	Sunshine Law applies to Neighborhood Boards	HonCC
	83/12/28	No right of access to tape recording of meeting	NC
	84/03/08	A meeting qualifies for Ch.92 treatment when convened.	OCS
	84/04/10	A quorum must be present to conduct official business	HonCC
	84/12/18	Sunshine law applies to items arising out of report	HonCC
	86/02/25	Voting by proxy or telephone prohibited	HonCC
Notice	75/08/27	General notice of hearing adequate	HonCC
	75/10/17	Governor's cabinet meetings exempt from sunshine	AG
	76/00/00	20-day notice required for hearing on rules	OMB
	79/08/27	Proper notice necessary for Council decision	HonCC
	81/01/02	Proper notice of meeting does not require access to documents	MCC
	82/03/16	UH appointment not violation of sunshine	AG
	84/04/10	A quorum must be present to conduct official business	HonCC
	84/05/24	Issue of "hand-carried" additions to agenda reviewed	OCS
	85/02/04	"New" and "Unfinished" business should be detailed on agenda	AG
Occupational.Safety	76/04/19	Investigation records re industrial safety not public	AG

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Parole.Board	75/00/00	Rules available without written request	OMB
Pay	72/09/11	City pay records not public	HonCC
Payroll	85/11/25	Payroll records of city contractor not public	HonCC
Payroll.Affidavits	70/00/00	Payroll affidavits of contractor not public	OMB
Permits	80/00/00	Building plans ordered released to public	CC1
	83/10/12	Building plans not public prior to permit	HonCC
	85/01/21	List of persons with gun permits confidential	HPD
Personal.Record	86/05/12	Written authorization required for release of personal information	HonCC
Personal.Records	83/12/30	Relationship between public and personal records defined	HonCC
	84/01/11	UH Regents cannot publish salaries of University employees	AG
	84/03/12	Salaries and periods of appointment considered confidential	UH
	85/10/18	Emergency ambulance service logs personal records	HonCC
	86/04/28	List of applicants for City housing development confidential	HonCC
Personnel	75/09/30	Meeting to develop job description cannot be closed	AG
	76/08/11	Civil Service Commission meeting on procedures open	HonCC
	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC
	78/10/12	Information in personnel files confidential	AG
	82/03/16	UH appointment not violation of sunshine	AG
	82/05/21	Names of job applicants not public	BOE
	82/05/24	Names of University job applicants private	UH
	83/06/08	Employment interviews may be closed	HonCC
	85/01/29	Privacy prevents release of names of disciplined police officers	HonCC
Planning.Commission	75/08/27	General notice of hearing adequate	HonCC
	84/10/02	Defects in agenda not sufficient to make meeting illegal	MCC
Plans	73/04/04	Building plans private until approved	HonCC
	80/00/00	Building plans ordered released to public	CC1
Police	61/00/00	Police records generally closed	HonCC
	74/00/00	Report of police investigation confidential	OMB
	76/08/11	Civil Service Commission meeting on procedures open	HonCC
	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	83/06/06	Employment interviews may be closed	HonCC
	83/11/30	Police rules intended for employees only	HPD
	84/04/11	Rules of Honolulu Police Department not available to public	HonCC
	85/01/21	List of persons with gun permits confidential	HPD
	85/01/29	Privacy prevents release of names of disciplined police officers	HonCC
	86/05/12	Written authorization required for release of personal information	HonCC
Police.Commission	83/06/08	Employment interviews may be closed	HonCC
	85/08/09	Police Commission does not need rule on public testimony	HawCC
Policy	05/28/76	"Fullest disclosure" is aim of Honolulu guidelines	
Prison	74/00/00	List of prison residents a public record	OMB
Privacy	71/00/00	Prohibition on disclosure of information held unconstitutional	CC3
	72/01/26	County records must be made available for public inspection	MCC
	77/11/30	Certain records of Liquor Commission are public	HonCC
	78/09/22	Animal records of the Quarantine Station are public records	AG
	78/10/12	Information in personnel files confidential	AG
	79/05/22	Motor vehicle registration data not public	AG
	82/05/21	Names of job applicants not public	BOE
	82/05/24	Names of University job applicants private	UH
	83/12/30	Relationship between public and personal records defined	HonCC
	84/01/11	UH Regents cannot publish salaries of University employees	AG
	84/03/12	Salaries and periods of appointment considered confidential	UH
	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
	85/01/21	List of persons with gun permits confidential	HPD
	85/01/29	Privacy prevents release of names of disciplined police officers	HonCC
	85/10/18	Emergency ambulance service logs personal records	HonCC
	85/11/25	Payroll records of city contractor not public	HonCC
	86/04/28	List of applicants for City housing development confidential	HonCC
	86/05/12	State law prohibits release of individual data to federal agency	AG
		Written authorization required for release of personal information	HonCC
Promotion.Panel	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC
Proposal	84/01/30	DSSH contract proposals public record	AG
Proposals	84/04/12	Proposals are public records unless containing exempt data	HonCC

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Proxy	86/02/25	Voting by proxy or telephone prohibited	HonCC
Public.Broadcasting	86/05/12	Audit of Broadcasting Agency not available for copying	OCCA
Public.Employees	58/00/00	Civil Service ratings are public records	HonCC
	65/00/00	Employee address & phone number not public	HonCC
	76/08/11	Civil Service Commission meeting on procedures open	HonCC
	76/10/14	Promotion Potential Review Panel exempt from Sunshine	HonCC
	78/02/14	Ethics violators cannot be publicly named	HonCC
Public.Hearings	75/10/22	Disorderly persons can be removed from hearing	HonCC
	76/00/00	20-day notice required for hearing on rules	OMB
Quarantine.Station	78/09/22	Animal records of the Quarantine Station are public records	AG
Quasi.Judicial	75/06/19	Adjudicatory functions of Civil Service Commission exempt from sunshine	HawCC
Quorum	84/03/08	A meeting qualifies for Ch.92 treatment when convened.	OCS
	84/04/10	A quorum must be present to conduct official business	HonCC
Real.Estate	80/08/27	Computer tapes with zoning data are public	HonCC
Reasons	71/00/00	Duplication of tape-recorded minutes allowed	OMB
	75/00/00	Rules available without written request	OMB
	76/00/00	State government directory available w/o written request	OMb
Recessed.meeting	80/07/10	Public notice must be given of meeting recessed to unspecified date	MCC
Records	46/00/00	Liquor Commission records open	HonCC
	53/00/00	Letters are public records when filed	HonCC
	58/00/00	Civil Service ratings are public records	HonCC
		Civil Service lists/exam records public	HonCC
	61/00/00	Autopsy reports are public records	HonCC
		Police records generally closed	HonCC
	65/00/00	Employee address & phone number not public	HonCC
	70/00/00	Payroll affidavits of contractor not public	OMB
	71/00/00	Duplication of tape-recorded minutes allowed	OMB
	72/00/00	Mental health records available to patient	OMB
	72/01/26	County records must be made available for public inspection	MCC
	72/09/11	City pay records not public	HonCC
	73/04/04	Building plans private until approved	HonCC

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	74/00/00	Report of police investigation confidential	OMB
		List of prison residents a public record	OMB
	75/00/00	Rules available without written request	OMB
	75/07/11	Sunshine Law requirements reviewed for city agencies	HonCC
	75/07/25	Movie operator's license application not public	AG
	76/00/00	State government directory available w/o written request	OMB
	76/04/19	Investigation records re industrial safety not public	AG
	76/04/28	Ambulance statistical reports confidential	HonCC
	76/06/25	Board of Water Supply records subject to disclosure under Sunshine Law	MCC
	77/00/00	Voter information public when filed with Clerk	OMB
		Vital records available for research	OMB
	77/11/30	Certain records of Liquor Commission are public	HonCC
	78/00/00	Annual report of private vocational school open	OMB
		Monthly catch reports are public records	OMB
		Health records available to patient	OMB
	78/02/14	Ethics violators cannot be publicly named	HonCC
	78/05/31	Auctioneer's records open to public	HonCC
	78/09/22	Animal records of the Quarantine Station are public records	AG
	78/12/18	Unclaimed property records are public records	AG
	79/00/00	Inter- and intra-office memos, telephone logs public	CC1
	79/02/05	Information on status of loans is confidential	AG
	79/05/22	Motor vehicle registration data not public	AG
	79/10/26	Auto registration info not public record	HonCC
	80/00/00	Community group provided legislative report info after filing suit	CC1
		Building plans ordered released to public	CC1
		Names and Medicaid income of doctors public	OMB
		Minutes must be available within 30 days	OMB
	80/08/27	Computer tapes with zoning data are public	HonCC
	81/00/00	General Excise Tax applications public	OMB
	82/00/00	Cost of copies must be "reasonable"	OMB
		Bid information confidential until opening	OMB
		Amount of successful bid public	OMB
	82/05/24	Names of University job applicants private	UH
	82/11/23	Challenge to voter registration not public	HonCC
	83/00/00	Legislature's detailed budget worksheets not public records	CC1

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	83/03/01	Water consumption data are not public	HonCC
	83/10/12	Building plans not public prior to permit	HonCC
	83/12/08	Transcript of fact finding hearings not public	HonCC
	83/12/30	Relationship between public and personal records defined	HonCC
	84/01/30	DSSH contract proposals public record	AG
	84/04/12	Proposals are public records unless containing exempt data	HonCC
		Proposals are public records unless containing exempt data	HonCC
	84/12/18	Names of persons licensed by DCCA are matter of public record	AG
	85/01/21	List of persons with gun permits confidential	HPD
	85/10/18	Emergency ambulance service logs personal records	HonCC
	85/11/25	Payroll records of city contractor not public	HonCC
	86/04/29	Working files of the Attorney General are not public records	AG
	86/05/12	Audit of Broadcasting Agency not available for copying	OCCA
Regents	79/07/28	Sunshine Law applies to orientation session of Board Regents	Senate
	85/11/27	Committees of UH Board of Regents must comply with Sunshine Law	AG
Research	86/05/12	State law prohibits release of individual data to federal agency	AG
Review	05/28/76	"Fullest disclosure" is aim of Honolulu guidelines	
	86/07/02	Meaning of "executive session" reviewed	HonEC
Rules	75/00/00	Rules available without written request	OMB
	76/00/00	20-day notice required for hearing on rules	OMB
	83/11/30	Police rules intended for employees only	HPD
	84/04/11	Rules of Honolulu Police Department not available to public	HonCC
	85/10/15	Public testimony provision applies to County Council meetings	HawCC
Salary	72/09/11	City pay records not public	HonCC
	84/01/11	UH Regents cannot publish salaries of University employees	AG
	84/03/12	Salaries and periods of appointment considered confidential	UH
School	78/00/00	Annual report of private vocational school open	OMB
Schools	77/07/08	Certain DOE licensing records confidential	AG
Sewage	79/00/00	Inter- and intra-office memos, telephone logs public	CC1
Tape.Recording	71/00/00	Duplication of tape-recorded minutes allowed	OMB

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	79/02/20	County Council does not have to make tape or transcript of meetings	MCC
	83/12/28	No right of access to tape recording of meeting	NC
Task.Force	79/02/27	Information on loans made by state task force is confidential	AG
Tax	80/08/27	Computer tapes with zoning data are public	HonCC
Tax.Records	81/00/00	General Excise Tax applications public	OMB
Telephone	65/00/00	Employee address & phone number not public	HonCC
	76/00/00	State government directory available w/o written request	OMB
	79/00/00	Inter- and intra-office memos, telephone logs public	CC1
	86/02/25	Voting by proxy or telephone prohibited	HonCC
Testimony	85/08/29	Public testimony can be restricted to committee meetings	MCC
	85/09/17	All Hawaii County boards allow for public testimony	HawCC
	85/10/15	Public testimony provision applies to County Council meetings	HawCC
	86/01/21	Each "reading" before Council must occur at separate meeting	HawCC
	86/02/10	Amended Sunshine Law requires opportunity to testify	AG
Trade.Secrets	78/00/00	Monthly catch reports are public records	OMB
	84/04/12	Proposals are public records unless containing exempt data	HonCC
Traffic.Records	61/00/00	Police records generally closed	HonCC
	79/05/22	Motor vehicle registration data not public	AG
	79/10/26	Auto registration info not public record	HonCC
Transportation.Dept	82/00/00	Bid information confidential until opening	OMB
		Cost of copies must be "reasonable"	OMB
Unclaimed.Property	78/12/18	Unclaimed property records are public records	AG
University	79/07/20	Sunshine Law applies to orientation session of Board Regents	Senate
	81/12/07	ASUH and other student organizations not subject to sunshine	AG
	82/03/16	UH appointment not violation of sunshine	AG
	82/05/24	Names of University job applicants private	UH
	84/01/11	UH Regents cannot publish salaries of University employees	AG
	84/03/12	Salaries and periods of appointment considered confidential	UH
	85/09/06	ASUH held not subject to Sunshine Law	

HAWAII SUNSHINE LAW OPINIONS

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
	85/11/27	Committees of UH Board of Regents must comply with Sunshine Law	AG
Violations	80/05/25	Sunshine violations not ethics matter	HonEC
Vital.Records	77/00/00	Vital records available for research	OIP
Voidability	84/12/18	Sunshine law applies to items arising out of report	HonCC
Voter.Registration	77/00/00	Voter information public when filed with Clerk	OIP
	82/11/23	Challenge to voter registration not public	HonCC
Water	76/06/25	Board of Water Supply records subject to disclosure under Sunshine Law	MCC
	83/03/01	Water consumption data are not public	HonCC
	83/04/05	Advisory committee on pesticides exempt from Sunshine Law	1CC
Worksheets	83/00/00	Legislature's detailed budget worksheets not public records	CC1
Written.Request	75/00/00	Rules available without written request	OIP
	76/00/00	State government directory available w/o written request	OIP

PART II

CHRONOLOGICAL LISTING OF ABSTRACTS

YR/MON/DAY	SOURCE	ABSTRACT
46/00/00	Honolulu Corporation Counsel Op. 46-18/68	Records of the Liquor Commission, including information furnished by applicants for liquor licenses, are public records and open for inspection.
53/00/00	Honolulu Corporation Counsel Op. 53-44	Letters or documents received by the Clerk's office written by private citizens are not subject to public inspection until ordered "filed for record", 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.
58/00/00	Honolulu Corporation Counsel Op. 58-2	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.
	Honolulu Corporation Counsel Op. 58-98	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.
61/00/00	Honolulu Corporation Counsel Op. 61-25	Autopsy reports prepared by the Medical Examiner are public records which are open to the public.
	Honolulu Corporation Counsel Op. 61-52	Records of the Honolulu Police Department, except records of traffic accidents under certain conditions, are not subject to public inspection unless permission is granted by the Chief of Police or the Prosecuting Attorney.
65/00/00	Honolulu Corporation Counsel Op. 65-63	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.

YR/MON/DAY	SOURCE	ABSTRACT
70/00/00	Ombudsman Opinion 70-708	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.
71/00/00	3rd Circuit Court, C.A. No. 2366	The Big Island Press Club went to court to challenge a county ordinance which allowed proceedings of the Board of Ethics to take place in meetings closed to the public. The Court ruled that Board deliberations could be closed only after a finding that "the subject does involve personal matters affecting the privacy of an individual." In addition, based on a lengthy analysis of the public's right to know, the Court invalidated two provisions requiring that information about ethics violations be kept confidential. The Court held that these provisions were overly broad and violated the first amendment. Big Island Press Club, et. al., vs. Board of Ethics of the County of Hawaii.
	Ombudsman Opinion 71-313	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 "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.
72/00/00	Ombudsman Opinion 72-967	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

YR/MON/DAY	SOURCE	ABSTRACT
		family or legal guardian. Subsequently, state law was amended to clearly allow a patient access to their own records except when such disclosure is clearly adverse to their own medical interests.
72/01/26	Maui Corporation Counsel Opinion	The Maui Corporation Counsel advised the mayor that all records of the county, except those that would invade the personal privacy of any individual, should be considered public records and made available upon request.
72/09/11	Honolulu Corporation Counsel Op. M72-68	Information from City payroll records, including exact gross pay, deductions, garnishments, etc., held to be confidential. Other information, such as employee title, grade level, salary range and total amount of City payroll is public.
73/04/04	Honolulu Corporation Counsel Op. SR73-4	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.
74/00/00	Ombudsman Opinion 74-1498	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 "records of the police department or of the prosecuting attorney..." 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.
	Ombudsman Opinion 74-365	A local organization requested access to a list of residents of the state prison, but the Corrections Division maintained that the list was not public information. After review by attorney general, the Corrections Division was advised that a list of residents at the Prison would appear to be a matter of public record and the prison should not keep

YR/MON/DAY	SOURCE	ABSTRACT
		such information from the public.
75/00/00	Ombudsman Opinion 75-1515	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.
75/06/19	Hawaii County Corporation Counsel Opinion	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 "quasi-judicial" 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.
75/07/09	Attorney General Memorandum	After the Sunshine Law was passed by the Legislature, the Attorney General prepared guidelines "to inform governmental bodies involved...." 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.
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

YR/MON/DAY	SOURCE	ABSTRACT
		meetings, and the right to obtain minutes of these meetings...." [An updated version of these guidelines was issued by the Corporation Counsel in response to a request from Councilmember Marilyn Bornhorst, February 13, 1985.]
75/07/25	Attorney General Op. 75-7	Based on interpretation of the legislative history of the sunshine law, applications for motion picture operator's licenses under Chapter 448E HRS held not to be public records and not subject to inspection. Public disclosure held to violate privacy of individual.
75/08/27	Honolulu Corporation Counsel Op. M75-93	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.
75/09/30	Attorney General Op. 75-11	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.
75/10/17	Attorney General Letter	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 "for a reasonable time", but also said that it is assumed "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...."

YR/MON/DAY	SOURCE	ABSTRACT
75/10/22	Honolulu Corporation Counsel Op. M75-116	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.
76/00/00	Ombudsman Opinion 76-1283	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."
	Ombudsman Opinion 76-2379	The Department of Accounting and General Services (DAGS) required a written request and reasons in order to obtain a copy of the State Government Telephone Directory. After consultation with the Ombudsman, DAGS "was uncertain whether the directory could be considered a public document". However, effective immediately, DAGS agreed to sell the directory to the general public, as long as copies are available, without requiring a written request.
76/04/19	Attorney General Op. 76-3	The Attorney General held that records from investigations of the Department of Occupational Safety and Health are not public records. The legislative history of relevent laws shows that such records were meant to remain confidential. Disclosure of information relating to the identification of witnesses and information and statements given by them in an accident investigation cannot be released to the public. Other information such as recommended safety measures can be released. Nothing prevents anyone from seeking information directly from witnesses to an industrial accident.
76/04/28	Honolulu Corporation Counsel Op. M76-47	A UH researcher requested access to computer tapes containing Ambulance Statistical Reports from the Emergency

YR/MON/DAY	SOURCE	ABSTRACT
		Medical Services Program. Assurances were given that the information on individual patients would be kept confidential. It was held that the tapes could not be made available. A patient has a right to non-disclosure of their medical history, and that information is exempt from release unless there is an "overriding public interest", a court order, specific authorizing legislation, or consent from the patient.
76/05/28	Honolulu Mayor's Directive No. 199	Following passage of the Sunshine Law in 1975, the Honolulu Corporation Counsel circulated a memorandum containing guidelines for application of the new law. "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," the memo states. The memo goes on to review the basic provisions of the original Sunshine Law.
76/06/25	Maui Corporation Counsel Opinion	The director of the Maui County Board of Water Supply asked whether Board records are considered "public records" subject to the Sunshine Law. The Corporation Counsel responded that the Board of Water Supply is a board as defined by the Sunshine Law, and that all records "which do not invade the right of privacy of any individual" must be available for public inspection.
76/08/10	Honolulu Corporation Counsel Op. M76-78	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 "there is no basis for any argument that the City Council is somehow in a more privileged position than an administrative board or commission" with regard to Sunshine Law requirements.
76/08/11	Honolulu Corporation Counsel Op. M76-81	Meetings between the Civil Service Commission and the

YR/MON/DAY	SOURCE	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.
76/10/14	Honolulu Corporation Counsel Op. M76-101	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.
77/00/00	3rd Circuit Court, Civ. No. 4684	A Hawaii County Council subcommittee on collective bargaining metin 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 cses 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.
	Umbudsman Opinion 77-647	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.

YR/MON/DAY	SOURCE	ABSTRACT
	Ombudsman Opinion 77-985	A researcher living on a neighbor island requested access to birth, death, and marriage records for research purposes. The request was turned down by a neighbor island District Health Office because permission of the Director of Health is necessary for release of such records. It was determined that due to "stringent statutory provisions", birth records were accessible only in Honolulu. However, death and marriage records could be made available for purposes of research provided that the researcher complied with certain conditions to protect the confidentiality of the records.
77/07/08	Attorney General Memorandum	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.
77/11/30	Honolulu Corporation Counsel Op. M77-112	Certain records kept by the Liquor Commission are public records and subject to public inspection. These include minutes of Commission meetings, and the following documents accompanying license applications: Tax clearance, partnership agreements, certificate of incorporation, map of premises, names of neighboring property owners. Employee registration records and gross sales reports are confidential. Correspondence and intra-office memos may be public, depending on their "contents and purpose".
78/00/00	Ombudsman Opinion 78-1550	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

YR/MON/DAY	SOURCE	ABSTRACT
		that the annual reports are required by law and that they are public records which should be available for inspection.
	Ombudsman Opinion 78-252d	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.
	Ombudsman Opinion 78-362	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.
78/02/14	Honolulu Corporation Counsel Op. #78-7	No express or implied language was found in relevant provisions of the City Charter to permit the City Ethics Commission to release the names of Board of Water Supply employees found to be in violation of ethics guidelines. The Corporation Counsel recommended an ordinance to allow such public disclosure.
78/03/13	Honolulu Corporation Counsel Op. #78-16	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 superceded only in the event that more stringent requirements for open meetings are created by the county.
78/05/31	Honolulu Corporation Counsel Op. #78-54	Any person desiring to see the record books of an auctioneer may inspect them during regular business hours. The records must include an inventory of items offered for sale in each public auction. The director of Finance has no authority to grant or deny any person the right to inspect auctioneer's records.

YR/MON/DAY	SOURCE	ABSTRACT
78/09/22	Attorney General Memorandum	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.
78/10/12	Attorney General Memorandum	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. Amemiya.
78/11/20	Honolulu Corporation Counsel	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 its 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."
78/12/18	Attorney General Memorandum	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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		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.
79/00/00	1st Circuit Court, SP 4997; 79 HLR 79-0543	The Honolulu Advertiser brought suit against the State Department of Health to gain access to records about the Mililani Sewage Treatment Plant and related pollution problems. The court held that the requested records had to be released. Further, the court held that "the State of Hawaii has no discretion to withhold the requested records contained in its files from the public unless the records requested are specifically exempted from public inspection by constitution, statute, properly enacted regulation, or court rule." Honolulu Advertiser vs. George Yuen, Director of the Department of Health, and the State of Hawaii.
79/02/05	Attorney General Memorandum	In a legal memorandum addressed to Hideto Kono, director of the Department of Planning and Economic Development, the Attorney General states that data concerning "loans, including borrowers' names, amounts, and status of repayment" are confidential. The memo finds that the reports "are prepared only for the purpose of internal management of the accounts," and that no entries are required to be made by law. In addition, the Attorney General finds that certain information, including "identifying information (the loan numbers, the names of borrowers, and the dates of the loans), the amounts and balances, and the status of repayment (whether current or delinquent)" may invade the right of privacy of individuals "since the status of repayment without further explanation of the circumstances...may unfairly and adversely affect the reputation of the borrowers." Memo prepared by Maurice S. Kato, Deputy Attorney General.
79/02/20	Maui Corporation Counsel Opinion	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.
79/02/27	Attorney General Memorandum	In a memorandum addressed to John Farias, chairman of the state Board

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		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.
79/05/22	Attorney General Letter	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.
79/07/28	Senate Majority Attorney	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 by Tom Kaser published in the Honolulu Advertiser on July 28, 1979.
79/08/27	Honolulu Corporation Counsel Op. M79-62	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

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		notice of meetings to be posted 6 days prior to the scheduled meeting time.]
79/10/26	Honolulu Corporation Counsel Op. #79-73	A company involved in mailing services requested information on all new owners of cars and trucks, including names and address of registered and legal owners. The company intended to use such information to develop mailing lists. Such information was held to be exempt from release under the Sunshine Law because its release would violate other statutes.
80/00/00	1st Circuit Court, Civ 59632	The City Building Department refused to allow public access to building permit applications, and "all plans, specifications and other documentation submitted" with them, related to a new condominium proposed at Kaola Way and Pacific Heights Road. A suit was filed seeking access to these records. Judge Arthur Fong ordered the Building Department to make all of the documents available without delay. Pauoa-Pacific Heights Community Group, et. al, vs. Building Department, City and County of Honolulu.
	1st Circuit Court, Civ. No. 62408	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 Oahu 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.
	Ombudsman Opinion 80-2794	Following publication of a newspaper article listing the names and Medicaid incomes of doctors who earned the most money through the program, a complaint was filed alleging that the release of the information violated the privacy of doctors. The AG determined that there was no statute

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		prohibiting the release of such information, and that information concerning the income and names of doctors receiving Medicaid funds are public records.
	Ombudsman Opinion 80-2380	A Big Island woman requested copies of the minutes of a Board meeting five weeks after the meeting was held. The Board maintained that it was unable to prepare, correct, and distribute minutes within the 30-day period required by law. The Ombudsman noted, however, that the statute "appeared specific as to the requirements that minutes be available within 30 days after a meeting." The Board subsequently agreed to make minutes available in draft form within the 30 days.
80/05/23	Maui Corporation Counsel Opinion	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 "board" as defined by the law and, therefore, "the provisions of that section respecting minutes of a board apply to the minutes of the committee."
80/05/25	Honolulu Ethics Commission letter	A member of the Honolulu City Council requested an opinion from the county Ethics Commission concerning possible Sunshine Law violations involving a "briefing" held by the Council's Zoning Committee. The Ethics Commission determined that "there are no standards of conduct applicable to officers and employees who are alleged to have violated the provisions of the Sunshine Law." The Commission further recommended that any requests regarding enforcement be referred to the Prosecutor or the Attorney General.
80/07/10	Maui Corporation Counsel Opinion	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. "However, if a meeting is adjourned sine die (without day), such an adjournment terminates the meeting. Any resumption of

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		said meeting would be, in fact, the beginning of a new meeting for which new notice should be given [references omitted]." The failure to provide public notice of the new meeting "would clearly subvert the public notice requirement of Subsection 92-7(a), HRS."
80/08/27	Honolulu Corporation Counsel Op. #80-44	Real estate data services requested access to computer tapes controlled by various City agencies, notably the Building Department and the Department of General Planning. The information sought included the street name, street address, tax map key number and zoning status of parcels of land throughout Honolulu. It was held that provisions of the Sunshine Law protecting privacy referred to the privacy of persons, not property. The Corporation Counsel therefore concluded that the information is a public record and available for public inspection, and that duplicate tapes could be made available to the public.
81/00/00	Ombudsman Opinion 81-547	The Tax Department followed a policy of allowing the public to review general excise tax applications at its offices, but would not furnish copies of these documents. Responding to a complaint, the Attorney General determined that "there is no legal basis to prohibit the furnishing of copies of GET applications," and the Department therefore agreed to make copies available upon request.
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 to 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

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		"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."
81/12/07	Attorney General Letter	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...."
82/00/00	1st Circuit Court	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.
	Ombudsman Opinion 82-2277	The Department of Health awarded a contract for the printing of its newsletter. The amount involved was under $4,000 and, therefore, formal bidding procedures were not required. However, several companies were asked to submit cost estimates, and an unsuccessful bidder asked the Department to disclose the amount of the successful bid. The Department refused. After consultation with the Ombudsman, the Department agreed to provide the information about the successful bid.

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	Ombudsman Opinion 82-67	The Department of Transportation was asked for information about the number of persons intending to bid on a certain contract. In consultation with the Attorney General, it was determined that "the names and the number of persons" submitting bids is confidential "until after the opening of bids...."
	Ombudsman Opinion 82-860	An individual complained that a $1 per page fee for copies being charged by the Department of Transportation was excessive. The Ombudsman noted that the Sunshine Law allows charges for "reasonable cost" of such copies. Subsequently the Department reduced its copy fee to 25 cents per page.
82/03/16	Attorney General letter	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 "affect a significant number of persons" and was primarily a matter of "internal management". Further, the AG 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.
82/05/21	State Board of Education letter	The Sunshine Law Coalition requested a complete list of the persons who had applied for the positions of Superintendent of Education and State Librarian in 1981 and 1982. The Board of Education refused to disclose the names of applicants, holding that the release of this information is prohibited by Chapter 92E, HRS. Even if the applications are public records, the Board held that it could not reveal the names because this would violate the privacy of the persons involved.
82/05/24	University of Hawaii letter of 5/24/82	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

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		92E HRS.
82/11/23	Honolulu Corporation Counsel Op. #82-95	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."
83/00/00	1st Circuit Court, Civ. No. 78096	Television station KHON went to court after the state Department of Health refused to allow the public and press to attend a meeting of its advisory committee appointed to consider the problem of pesticides in drinking water. The Court held that the committee was purely advisory, had no final decision-making power, and was made up of volunteers. Thus, the committee was "not formed by statute, constitution, rule or executive order" and is not subject to the open meeting provisions of the Sunshine Law. An appeal to the Hawaii Supreme Court was rejected on the grounds that the issue was moot. KHON-TV, Inc., vs. George Ariyoshi, et al.
	1st Circuit Court, S.P. 6126	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.

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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. M83-15	The Campbell Estate requested access to Board of Water Supply water consumption data pertaining to tenants in Campbell Industrial Park. The Estate wanted to analyze the data and utilize the findings in projecting future development of the area. The Corporation Counsel held that water consumption records constitute a "public record", but they they cannot be released because they are also "personal records" of tenants and their release would violate the personal privacy of those tenants. A written statement from each tenant would be necessary to authorise release of these records. [This opinion conflicts with later opinion that "personal records" apply only to "natural persons"]
83/06/08	Honolulu Corporation Counsel Op. M83-25	Meetings of the Police Commission to interview applicants for the position of Chief of Police, and to deliberate towards 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.
83/00/05	First Circuit Court, Civil No. 78056	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 Huddy 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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		information and may or may not make recommendations to the Director." Citing three mainland cases, the Court ruled the committee was "a body of voluntary, unpaid, consultants which the Legislature did not intend to come within the purview of Chapter 92...." and, accordingly, its meetings did not have to be open to the public. An appeal to the Supreme Court was dismissed after the Court ruled that the case was "moot".
83/10/12	Honolulu Corporation Counsel Op. No3-54	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.
83/11/30	Honolulu Police Department Letter	In response to a citizen's request, the Chief of Police stated that the Honolulu Police Deparment's Rules and Regulations "is not available for public use. Its contents are intended for employees of the department only." [Letter from Chief of Police Douglas G. Gibb to Mr. Desmond J. Byrne.]
83/12/01	Maui Corporation Counsel Opinion	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 "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." Under the proposal, the counties would be able to set their own sunshine rules and procedures.
83/12/08	Honolulu Corporation Counsel Op. M83-65	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.

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83/12/28	Honolulu Neighborhood Commission letter	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]
83/12/30	Honolulu Corporation Counsel Op. #83-7u	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.
84/01/11	Attorney General Letter	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 92E 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. Masumoto, Univeristy Vice-President for Administration; approved by Attorney General Tany S. Hong. Copy provided to Common Cause/Hawaii by Mr. Masumoto on 5/31/84.]
84/01/30	Attorney General Letter	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

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		to be available to the public subject to limited exemptions. Personal information regarding employees can be withheld, as can certain information from the contractor requested by the comptroller.
84/03/08	Office of Council Services Memo	The Office of Council Services prepared a memo concerning certain rights of the neighborhood boards. Any meeting called to make a decision or deliberate towards a decision is subject to chapter 92. Certain requirements of chapter 92 preceed the meeting itself, including requirements for proper notification. "Consequently, a meeting qualifies for Chapter 92 treatment at the time it is called, not at the time it actually takes place. This would have to be true because one cannot predict beforehand whether a quorum will be present at the time the meeting convenes."
84/03/12	University of Hawaii Memorandum	In a memo addressed to "All Vice Presidents and Chancellors," University of Hawiai president Fujio Matsuda advised that Chapter 92E HRS "expressly prohibits the University of Hawaii and its personnel from disclosing or discussing personal records...." According to Matsuda, "the attorney general's office has advised the University to refrain from disclosing any information about University personnel other than name and position title. Salaries and periods of appointment are considered confidential."
84/04/16	Honolulu Corporation Counsel Op. M84-11	A neighborhood board failed to have a quorum for a regularly scheduled meeting, and a question was raised as to whether this "meeting" was sufficient to meet their obligation, under the Neighbor Plan, to hold a certain number of meetings per year. The opinion from the Corporation Counsel held that the Sunshine Law requires the presence of a quorum in order to conduct official business. "Board action taken in violation of Chapter 92, HRS, would be null and void." However, it was also held that for purposes of meeting the obligation of holding a meeting, the convening of a meeting and issuance of proper notice was sufficient, even though it had to

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		adjourn immediately due to lack of a quorum.
84/04/11	Honolulu Corporation Counsel Letter	In response to an inquiry by Common Cause, the City Corporation Counsel stated that the rules and regulations of the Honolulu Police Department "are matters of internal management and, by law, are not available for public inspection unless the department chooses to make them so available." Further, the letter stated that the Chief of Police "has already indicated that these particular documents should not be released." [Letter from Gary M. Slovin, Corporation Counsel, City and County of Honolulu, to Ian Lind, executive director, Common Cause/Hawaii.]
84/04/12	Honolulu Corporation Counsel Op. #84-15	Common Cause/Hawaii requested access to proposals submitted to the City Housing Department pursuant to a design/bid competition. An opinion of the Corporation Counsel held that such proposals are public records that are open to inspection unless release of the information would (a) violate personal privacy, (b) reveal trade secrets, or (c) impair present or imminent contract awards. In order to justify withholding, "the burden is on the party to prove that the information is a trade secret". In addition, the public's interest in disclosure must be balanced against any reasons alleged to justify withholding of records from the public. The opinion appears to require a change in City policy, which in the past routinely denied public access to these proposals.
84/05/24	Office of Council Services Letter	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 "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." It addition, the memo advises that "a hand-carried item relating to a properly noticed agenda matter should be examined to determine whether or not its impact

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		changes the agenda item so significantly that it...becomes new subject matter."
84/07/25	Honolulu Corporation Counsel letter	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 2/15/85 letter from Richard Wurdeman to Councilmember Marilyn Bornhorst.]
84/10/02	Maui Corporation Counsel Opinion	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 relevent 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.
84/12/18	Attorney General Opinion 84-18	The Professional and Vocational Licensing Division of the State Department of Commerce and Consumer affairs licenses various professionals. A computerized roster is maintained of the name, address, and type of license held by each individual licensee. The AG held that the address and telephone numbers of licensees are personal information and are required to remain confidential by Chapter 92E HRS. However, the names and type of license held by each individual is a matter of public record and should be available.
	Honolulu Corporation Counsel letter	The Mililani Neighborhood Board (#26) 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

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		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."
85/01/21	Letter from Chief of Police Douglas Gibb	In response to a request from a private citizen, Police Chief Douglas Gibb responded that "Chapter 92E of the Hawaii Revised Statutes limits this department from disclosing or authorizing the disclosure of personal records by any means to any person other than the individual to whom the record pertains." For this reason, lists of persons holding gun permits issued by the Honolulu Police Department are not considered public records by the Police.
85/01/29	Honolulu Corporation Counsel Opinion 85-3	The Corporation Counsel interprets Chapter 92E to prevent the public release of the names of police officers against whom a complaint has been filed and sustained by the Police Commission. According to the Corp Counsel, such information would be part of a "personal record", would not fall under any of four specific exemptions, and therefore must remain confidential as a matter of law.
85/02/04	Attorney General Opinion 85-2	The State Commission on the Status of Women asked whether their meeting agendas could contain general references to "new business" or "unfinished business". The AG 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 AG 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.
85/02/13	Honolulu Corporation Counsel Memorandum	In response to a request from Councilmember Marilyn Bornhorst, acting Corporation Counsel Richard Burdeman updated a set of guidelines issued to city agencies regarding proper implementation of the state Sunshine Law. The memo

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		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 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 penalities for willfull 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.]
85/08/09	Hawaii County Corporation Counsel Opinion	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 raviews other changes in the law regarding executive sessions and enforcement actions.
85/08/29	Maui Corporation Counsel Opinion	The Corporation Counsel held that Act 278 (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 278 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.]
85/09/06	Attorney General Op. 85-18	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.
85/09/17	Hawaii County Corporation Counsel Opinion	In response to a question raised by a member of the County Council,

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		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.
85/09/27	Maui Corporation Counsel Opinion	The Maui Corporation Counsel held that an "informational meeting" between the Planning and Land Use Committee of the Maui County Council and members of the Kihei-Makena Citizens Advisory Committee did not violate the Sunshine Law, Chapter 92 HRS. The opinion concluded that because the meeting would not appear to involve either making a decision or deliberating towards a decision, it was not a "meeting" as defined by the Sunshine Law. The rules of the Council would govern its conduct.
85/10/09	Maui Corporation Counsel	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.
85/10/15	Hawaii County Corporation Counsel Opinion	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 278 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.

YR/MON/DAY	SOURCE	ABSTRACT
85/10/18	Honolulu Corporation Counsel Letter	The Hawaii Kai Neighborhood Board requested access to the emergency ambulance service logs maintained by the Department of Health of the City and County of Honolulu. It was held that these logs constitute "personal records" that are not subject to disclosure because such disclosure would violate the right of privacy of persons involved.
85/11/25	Honolulu Corporation Counsel Op. No. 85-37	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 resonded 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 92E, HRS.
85/11/27	Attorney General Opinion No. 85-27	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.
86/01/21	Hawaii County Corporation Counsel Opinion	The Corporation Counsel advised the County Council that a proposed rule to restrict public testimony to committee meetings would be inconsistent with the Sunshine law as amended in 1985. "Therefore, we conclude that the proposal to limit an individual's right to testify on a specific item to only one council meeeting is not a 'reasonable administration of oral testimony by rule.' It is likely that a court would find it to be an infringement of the public's rights...."

YR/MON/DAY	SOURCE	ABSTRACT
86/02/10	Attorney General Op. No. 86-5	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 1985 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."
86/02/25	Honolulu Corporation Counsel Op. No. M 86-3	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."
86/04/08	Attorney General Letter	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 26-21 HRS and Section 128-4 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 92-2(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."
86/04/28	Honolulu Corporation Counsel Op. No. M86-13	During deliberations over the proposed Waiola Subdivision, the City Council requested the list of people who had submitted applications in response

YR/MON/DAY	SOURCE	ABSTRACT
		to published advertisments. The Corporation Counsel held that the list is a "personal record" as defined by Section 92E-1 HRS. Further, the Corporation Counsel found that the the statute does not provide for release of personal records to legislative agencies of the state or counties. Therefore, it was determined that the law requires that the list be maintained on a confidential basis and not released to the City Council.
86/04/25	Attorney General letter	In response to a request for information, the Attorney General wrote that "Our office documents are protected by the attorney-client privilege, executive privilege and specific statutory privileges." The letter went on to state that "we [the Department of the Attorney General] are the attorneys for state government and the government agencies and officials, not for individual private citizens of this State. If we were considered to be attorneys for individual private citizens, we would not be able to represent the state government or its agencies or officials in any case involving a private citizen, because there would be a potential conflict of interest in representation."
86/05/12	Attorney General Opinion No. 86-14	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 indentification criteria." The Attorney General responded that "While recognizing the merits of a computerized system of record keeping, we were unable to locate any statutory authority enabling the Apprenticeship Division to release the information requested. Therefore, we respond to your inquiry in the negative." According to the Attorney General, Chapter 92E HRS prohibits disclosure of this information to this federal agency, even for research and/or statistical purposes.
	Dept. of Commerce and Consumer Affairs Letter	Copies of financial audits of offices within the State Department of Commerce and Consumer Affairs were requested by a local business. The agency director responded in writing that a financial audit of the Hawaii Public Broadcasting Agency was available for inspection. "However, Department of the Attorney General has informed us that copies of the audit are not considered

YR/MON/DAY	SOURCE	ABSTRACT
		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.]
	Honolulu Corporation Counsel Op. No. M86-15	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.
86/07/02	Honolulu Ethics Commission Memorandum	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."
86/08/06	1st Circuit Court	A Painters' Union committee went to court to compel the State Department of Labor and Industrial Relations to disclose its findings in the case of a contractor accused of fraud. The union had filed a complaint alleging that a contractor has filed fraudulent payroll affidavits with the state. The Department of Labor and Industrial Relations investigated, but refused to disclose the result of its investigtion. After reviewing the documents, the Court ordered that the findings be made public. Painting Industry Recovery Fund vs. Robert Gilkey, director of Labor and Industrial Relations, and the State of Hawaii.

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HAWAII SUNSHINE LAW OPINIONS

A Keyword Index

A Common Cause/Hawaii Special Report

by

Ian Y. Lind

This index to Hawaii's Sunshine Law opinions is a valuable resource intended for easy reference use by journalists, researchers, lawyers, community activists, public officials and anyone elsewho deals with the government. More than 125 opinions issued by the Attorney General, the State Ombudsman, county attorneys, and various state and county agencies, are indexed in this report.

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Additional Opinions: Dec. 1987

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Address	78/08/14	Lists of names and addresses not available without consent	HonCC
Ambulance	85/07/11	Police officers may be permitted to review ambulance reports	HonCC
	85/10/11	Ambulance report forms cannot be disclosed to neighborhood board	HonCC
Archives	75/05/27	Municipal archives records subject to certain controls	HonCC
	77/02/03	Royalty schedule proposed for commercial use of city materials	HonCC
Arrest	79/01/12	Information on arrest of a city employee may be disclosed to dept head	HonCC
Arrest.Record	78/03/09	Criminal history information can be disclosed to reporter for research	HonCC
Civil.Service	84/08/08	Civil Service records may be dislcosed to department officials	HonCC
Commercial.Use	75/05/27	Municipal archives records subject to certain controls	HonCC
	77/02/03	Royalty schedule proposed for commercial use of city materials	HonCC
Crime	78/03/09	Criminal history information can be disclosed to reporter for research	HonCC
Driver.License	86/10/07	Information from drivers license and vehicle registration confidential	HonCC
Election	71/12/27	Voter registration affidavit is a public record	HonCC
Employment	79/01/12	Information on arrest of a city employee may be disclosed to dept head	HonCC
Employment.Practices	83/01/19	Final determination of hiring complaint a personal record	HonCC
Grant	83/01/19	Final determination of hiring complaint a personal record	HonCC
Law.Enforcement	75/04/02	Liquor Commission staff not law enforcement officials	HonCC
Legislature	86/08/13	Employee medical data confidential	HonCC
Liquor.Commission	75/04/02	Liquor Commission staff not law enforcement officials	HonCC
Manual	87/08/31	Agency procedure manual a public record	AG
Medical.Record	85/10/11	Ambulance report forms cannot be disclosed to neighborhood board	HonCC
Medical.records	77/07/27	Medical report of prisoner may be released to attorney	HonCC
	86/08/13	Employee medical data confidential	HonCC
Medical.report	84/08/08	Civil Service records may be dislcosed to department officials	HonCC
Motor.Vehicle	86/10/07	Information from drivers license and vehicle registration confidential	HonCC
Neighborhood.Board	85/10/11	Ambulance report forms cannot be disclosed to neighborhood board	HonCC
Newspaper	78/03/09	Criminal history information can be disclosed to reporter for research	HonCC
Ombudsman	86/07/30	Police Commission complaint files may be disclosed to Ombudsman	HonCC
Payroll	87/05/19	Certified payroll records from public works projects held confidential	HonCC
Personal.Record	83/01/19	Final determination of hiring complaint a personal record	HonCC
	83/12/30	Privacy provisions of Chapter 92E supercede City rules in most cases	HonCC

KEYWORD	YR/MON/DAY	SUMMARY	SOURCE
Personal.Recorda	78/08/14	Lists of names and addresses not available without consent	HonCC
Personal.Records	86/08/13	Employee medical data confidential	HonCC
	87/05/19	Certified payroll records from public works projects held confidential	HonCC
Photographs	77/02/03	Royalty schedule proposed for commercial use of city materials	HonCC
Police	78/03/09	Criminal history information can be disclosed to reporter for research	HonCC
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	85/07/11	Police officers may be permitted to review ambulance reports	HonCC
Police.Commission	86/07/30	Police Commission complaint files may be disclosed to Ombudsman	HonCC
Prison	77/07/27	Medical report of prisoner may be released to attorney	HonCC
Privacy	78/08/14	Lists of names and addresses not available without consent	HonCC
	83/01/19	Final determination of hiring complaint a personal record	HonCC
	83/12/30	Privacy provisions of Chapter 92E supercede City rules in most cases	HonCC
	86/08/13	Employee medical data confidential	HonCC
	87/05/19	Certified payroll records from public works projects held confidential	HonCC
Procedures	87/08/31	Agency procedure manual a public record	AG
Reputation	83/01/19	Final determination of hiring complaint a personal record	HonCC
Research	78/03/09	Criminal history information can be disclosed to reporter for research	HonCC
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Senior.Citizens	78/08/14	Lists of names and addresses not available without consent	HonCC
Voter.Registration	71/12/27	Voter registration affidavit is a public record	HonCC
Workers.Compensation	84/08/08	Civil Service records may be dislcosed to department officials	HonCC

Additional Opinions: Dec. 1987

YR/MON/DAY	SOURCE	ABSTRACT
71/12/27	Honolulu Corporation Counsel Op. 71-110	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.
75/04/02	Honolulu Corporation Counsel Op. 75-23	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.
75/05/27	Honolulu Corporation Counsel Op. 75-43	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.
77/02/03	Honolulu Corporation Counsel Op. 77-11	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.
77/07/27	Honolulu Corporation Counsel Op. 77-68	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."
78/03/09	Honolulu Corporation Counsel Letter	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

YR/MON/DAY	SOURCE	ABSTRACT
		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."
78/08/14	Honolulu Corporation Counsel Op. 78-82	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."
79/01/12	Honolulu Corporation Counsel	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 whesre 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 employenth might be placed in jeapardy" 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.
83/01/19	Honolulu Corporation Counsel	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 violted any laws. Further, it was held that the letter was also a personal record and Chapter 92E HRS precluded

YR/MON/DAY	SOURCE	ABSTRACT
		disclosure.
83/12/30	Honolulu Corporation Counsel Op. 83-70	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.
84/08/08	Honolulu Corporation Counsel Op. 84-27	The director of the City Department of Civil Service asked whether medical reports concerning employees on workers' compensation could be disclosed to the employee's department officials. The Corporation Counsel approved such disclosure on the ground that Civil Service merely serves as an agent for the employing department, and that departmental monitoring of the employees health status in order to determine ability to return to work is a legitimate purpose as defined in Section 92E-5.
85/07/11	Honolulu Corporation Counsel Op. 85-18	The City Physician asked whether the practice of allowing Honolulu Police detectives to review ambulance reports in order to determine the names of paramedics involved in particular cases was a violation of Chapter 92E HRS. The Corportation Counsel determined that the practice was permitted because the disclosure appears proper for the performance of police duties and pertains to legitimate law enforcement investigations.
85/10/11	Honolulu Corporation Counsel letter	The Hawaii Kai Neighborhood Board requested release of ambulance report forms so that they could review the performance of City paramedics and make recommendations regarding medical services. The ambulance reports had previously been determined to be personal records, but the Board argued that the law allows release of such records to another agency when the disclosure "reasonably appears to be proper for the performance of the requesting agency's duties and functions." However, the Corporation Counsel held that access to these records was not necessary in order for the Board to participate in the decisions of the City with regard to ambulance service. It was suggested that

YR/MON/DAY	SOURCE	ABSTRACT
		the Department of Health could provide "data on a monthly basis setting forth the average response times for that area."
86/07/30	Honolulu Corporation Counsel Op. 86-26	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 "request that they be reviewed only by thje 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."
86/08/13	Honolulu Corporation Counsel Op. 86-28	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.
86/10/07	Honolulu Corporation Counsel Op. 86-36	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 Registration 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 "by a specific compelling state interest". It was held that the information could thus be disclosed if "adequate assurances of the legitimate use" were obtained, and a surety bond secured.
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

YR/MON/DAY	SOURCE	ABSTRACT
		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.
87/08/31	Attorney General Letter	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.

WED MAR 28 1984 SB

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, Hill 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

WED MAR 28 1984 3B H

Privacy

By Hildegaard Verploegen and Gregg K. Kakesako
Star-Bulletin Writers

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 355 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 Committees 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 or 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 names of complainants, if requested, would

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Day Care Measure Debated in House

MAR 28 1984 B

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 baby-sitting to be licensed.

However, a person who does not charge a fee for baby-sitting 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 Jane Okubo, head of the department's preschool licensing unit, said it was rare that an investigation took longer than two 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 baby sitters 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 preschool 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 pre-schools 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 employe 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 Watanabe
Star-Bulletin Writer

Hawaii is one of the few states that prohibit public scrutiny of records on preschools and child day-care centers it licenses.

That fact emerged after the Star-Bulletin interviewed a man considered an expert on national child-care regulatory issues and made a random check with government agencies in other states.

The Star-Bulletin has tried to gain access to complaint and inspection records on preschools kept by the state Department of Social Services and Housing, which licenses the schools. However, the state attorney general has ruled that such records are not a matter of public information, citing the state's right to privacy law.

The state House Human Services Committee was scheduled to hold a hearing today on an administration proposal to amend the law to allow release of information on complaints that have been investigated and substantiated.

THE PRIVACY issue has not kept other states from releasing such information.

It used to be that records kept by child-care licensing agencies throughout the nation tended to be off-limits to the public.

But about 10 years ago, when there was a "surge of openness of public records," many states moved to make all such records — not just on licensing child-care operations — available for inspection, according to Norris Class, who specializes in child-care regulatory administration.

Since then, some states have moved to a middle ground, allowing the public to scrutinize licensing records subject to certain restrictions, Class said.

Class, interviewed by telephone at his home in Topeka, Kan., Friday, said his comments were "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.

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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 Hedgecoth, 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.

Hedgecoth 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 Hedgecoth 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

Problem in L.A., C-2

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 Rewick, 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, Rewick 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 Kawaiahao Child Care Center, and Marian Walsh, director of Waiokeola 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."

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Directors Say Parents Have Right to Know

Continued from Page One

But she agrees with Rewick that it's 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 Waiokeola, 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 come through (our system in a year), you have a certain proportion of nuts and kooks," 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 complainant)."

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 (one from) someone who identifies himself."

Richmond, of Kawaiahao Child Care, said she doesn't believe any person's privacy would be violated: "Just as any organization is open to certain scrutiny, I think parents have a right to know."

Meanwhile, those interviewed said all the recent publicity on preschools has served to make everyone in the business 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.

Both 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 anybody."

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.

Banning Scrutiny of Preschool Records

By William Cox

Managing Editor

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 to check on how children are treated than 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 Catterall
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 Geyrozaga, 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 David Dezzani said the decision was "so new, so much on point" that Yim could not ignore it.

Geyrozaga, 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 Yuclan 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 spouses 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 courts.

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

Advertiser attorney Jeffrey Portnoy maintained that the juror-privacy 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" to keep courts open "except in the most extraordinary circumstances."

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

Dezzani gave no assurance that the Star-Bulletin would not publish jurors' names. Jurors, 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. Bone
Advertiser Staff Writer

In a speech to a media group yesterday, 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."


Portnoy

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 Haiekulani 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 municipal 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 declared 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 . . .

"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 sewer 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 Mainland 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 fiat, and public documents such as work sheets are perversely 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 hasty and poorly drafted Fair Information Practice Act in 1980 which had "laudable purposes" to protect individual privacy in certain cases but whose use has been perverted "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 some 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 bureaucrat," Portnoy said, giving several examples where the act was 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 that 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 motorists have been stopped by men posing as police officers, First Deputy City Prosecuting Attorney Paul Toyozaki said in prepared remarks.

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

Police Lt. Robert Aton also endorsed a bill to change the offense from a misdemeanor to a felony.

Police, Prosecutors Seek a Freer Rein on Eavesdropping

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By Phil Moyer
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 occupants.

When Honolulu police Lt. Ross Wong 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 1978.

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 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 over-zealous 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 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
Advertiser Staff Writer

Police Chief Douglas Gibb yesterday joined City Prosecutor Charles Marsland in denouncing a recent state Supreme Court ruling that requires court warrants for police undercover audio or video tape 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 Erick 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 Hawaii 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 wiretap 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 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 scads 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 one of the few states in the union, besides Oregon, where you have this difficulty of protecting the privacy rights of criminals."

Marsland said this week that the Supreme Court 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," Marsland 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 attack crime."

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

"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 OCT 22 1983 AD F

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 comendation 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 discipinary 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 commendations 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 H

By June Watanabe
Star-Bulletin Writer

THE state's 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 particular issue will be the requirement for an adversary counsel to argue against any wiretap application.

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 1981 and 1982, three were made in 1980 and two in 1979. None has been made so far this year.

All five applications involved the Honolulu prosecutor's office, although one in 1979 — the first to 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 Maui-Honolulu officials in the much-publicized John Lincoln murder-for-hire case.

Before the law went into effect, law enforcement officials could legally 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 tinkered with 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 Hitchcock, 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's 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

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State's Wiretap Law to Come Under Scrutiny

Continued from Page One

that they almost do not warrant the elimination of wiretaps."

HOWEVER realizing that its philosophy wasn't going to prevail the ACLU retreated and instead argued for the most stringent safeguards possible, Days said.

The resulting law included provisions to:

—Require that a court-appointed attorney play the devil's advocate in arguing against any wiretap application.

—Require only the attorney general or the prosecutor (from whatever county) apply personally for the wiretaps. No underlings will do.

—Prohibit court-ordered bugging (placing an electronic surveillance device inside or adjacent to the place being bugged).

—Allow wiretaps only in the pursuit of certain crimes, namely organized crime (extortion, coercion or bribery), murder, kidnapping or felony criminal property damage (such as arson). Even then, officials must have probable cause to believe that such crimes have been committed.

—Require periodic reports to the court on the status of the wiretaps.

—Prohibit eavesdropping on any conversation not concerned with the criminal activity being monitored.

MANY OF the restrictions, in one form or another, can be found in the federal wiretap act — the Federal Omnibus Crime Control and Safety Act of 1968. Notable exceptions are the requirement for an adversary counsel and the prohibition against bugging.

Honolulu Prosecutor Charles Marsland complains, "There are so blasted many safeguards."

By far the biggest complaint from prosecutors is the necessity for the adversary counsel, even among those who haven't asked for wiretapping. The one exception is Kauai Prosecutor Gerald Matsunaga, who said he doesn't have any real objections to the law because he has yet to deal with it.

But the flap over the adversary counsel has surrounded the law from the beginning. It was a year after the law was enacted that prosecutors, who had characterized it as unworkable, finally decided to give it a chance.

Maui Prosecutor Floyd Mossman summed up the main objection this way: "The danger is that there is one more person who knows what's happening and that can pose substantial risks."

But Mossman says that's not the reason his office hasn't used wiretapping more often. The occasion hasn't arisen and he just doesn't have the equipment, Mossman said.

BIG ISLAND Prosecutor Jon Ono said his office hasn't taken advantage of the law because "wiretap is actually a last resort. Fortunately, we have been able to get our information in other ways."

Still, Ono describes the law as "time-consuming and cumbersome," with the wiretap counsel "a kind of an overkill because you have the judge. In effect, you're saying the judge is not competent to make the decision himself."

Charles Marsland

There are so many safeguards

Marsland was more succinct. The law "stinks. It's drafted in such a way that it makes it difficult to use (and) to make damn sure that we protect the criminal."

Deputy prosecutor Ed Kubo, the wiretap expert in the Honolulu office, said, "There's no doubt that in requiring the adversary counsel (lawmakers) wanted to ensure that a person's privacy is protected. But legitimate law enforcement activity into illegal activity has to be balanced. We shouldn't be handcuffed."

Kubo also said that the adversary proceedings amount to a "mini-trial," making the effort a "complicated, lengthy" process in which "security leaks are bound to happen."

On that point, Hitchcock retorts, "There's never been a leak. Ask (Marsland) to show when there's been a leak."

Marsland refused to discuss any specific wiretap case or even to confirm that his office has conducted wiretaps.

BUT beyond the adversary counsel, Marsland and Kubo had a number of other gripes about the law. They don't like the fact that bugging is banned, that the kinds of crimes open to wiretapping are limited ("We can't prosecute misdemeanors, like prostitution, for example, if we pick up evidence during a wiretap, even though prostitution is tied to organized crime," Marsland said) and that authorities have to minimize interception of non-incriminating conversations.

The last "is always a problem because an investigator may have to identify different voices, pick up a pattern, decode messages. Totally innocuous conversations may disclose something heavy," Marsland said.

The law is better than nothing, Marsland concedes, "but this is a law that should incorporate the means of allowing us to work swiftly. You can't sit around and have adversary hearings and appeals. If you're dealing with crime, if the law should be a vehicle that's almost self-starting — that you can utilize in a hurry — by any stretch of the imagination believe organized crime doesn't wiretap?"

But not all law enforcement officials are as negative as Marsland.

Honolulu acting police chief Harold Falk, for one, said, "Generally, we find it workable and useful. In certain cases, we have found it very effective. There may be some modifications that have to be made in it, but we would like to see a wiretap law remain on the books for our use."

Harold Falk

Law very effective

CAPT. THOMAS Pickard, of the Honolulu Police Department criminal investigation division said, "We don't have that many times to use it because of very good restrictions. We don't just use it anytime, like search warrants. I think it's a good law from my personal point of view."

Falk said the police department has not yet decided what kind of changes, if any, it will ask for when the law is reviewed by legislators next year. The law was written to "sunset" after six years unless renewed by the legislature.

As for Hitchcock, he touts the law "as one of the best (wiretap) laws on the books. Many states have asked for a copy of it. It's not that it helps organize crime," he said, "but that it prevents the average citizen if it's cumbersome, I agree, and restrictive. But at the same time, we have a responsibility not to get the people they (police) prosecutors) want to get, but to make sure we protect the people who need to be protected."

"I would, personally, feel relieved if they take away the advocate. If we get rid of the safeguards, there's a good chance the Legislature will get rid of the law."

But Marsland, who has not had much luck lobbying at the legislature, predicts, "I don't think they're going to do anything for law enforcement in the next session."

6 Senate Rebels Vow a Filibuster

FRI APR 22 1983 SB H

LAWSUIT LOSERS—Sen. Neil Abercrombie leads the way out of the courthouse this morning after a judge rejected a suit by dissident senators seeking to make public worksheets detailing the proposed state budget. Behind Abercrombie are Sens. Dante Carpenter, left, Lehua Fernandes Salling and Benjamin Cayetano. —Star-Bulletin Photo by Terry Luke.

By Gregg K. Kakesako
Star-Bulletin Writer

SIX maverick senators today lost their bid to make public worksheets detailing the state's proposed budget but the dissidents said they will proceed with a filibuster on the money package tonight — a move that could force the 1983 Legislature into overtime.

Circuit Judge Toshimi Sodetani ruled that the seven volumes of budgetary worksheets the dissidents requested are not "public documents" and, therefore, not open for public inspection.

After a 90-minute hearing this morning, dissident Democratic leader Benjamin Cayetano said he was "disappointed" by Sodetani's ruling and acknowledged that a legislative 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 unable to pass the $2.9 billion budget to 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 constitution forbids weekend sessions of the Legislature.)

Dissident Big Island Sen. Dante Carpenter said a filibuster would allow time during the weekend to develop "a greater understanding" of the budget.

Two other dissidents, Charles Toguchi and Neil Abercrombie, said there will be a lot of questions asked on the Senate floor tonight because they now do not have the seven volumes of worksheets which they believe are crucial to their understanding of what's in the budget.

Senate President Richard Wong, throughout the week-long fight on the budget, vowed that the session will not go past its midnight deadline but will adjourn as scheduled with the money package scathed but intact.

WONG REPEATED that promise on the Senate floor yesterday when he told his colleagues that a vote will be taken on the budget tonight sometime after 9 p.m.

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

An extension would delay a vote on other bills whose passage is linked to the budget.

These include legislation that would appropriate $72 million for the operating expenses of the judiciary and $1 million for the Office of Hawaiian Affairs, a $1-per-person tax credit, $20 million public works "pork barrel" bill, and a $1.5 million bill to help Kauai County pay for the damages caused by Hurricane Iwa.

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

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

BUT THE BIG question is

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Senate Mavericks Vow to Filibuster

Continued from Page One

whether Wong is willing to risk a further rift in the Senate by calling on his 14 supporters and the five-man Republican caucus to cut off debate and force a showdown 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 gag a fellow senator — an action that would be contrary to his style of leadership.

Despite criticisms from many quarters, Wong has prided himself as being "a fair person," allowing prolonged debate on issues, no matter how insignificant.

The budget battle spilled into the courts yesterday when the six dissidents asked Sodetani to force Wong and Senate Ways and Means Chairman Mamoru Yamataki to turn over budget documents.

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

The six — Cayetano, Lehua Fernandes Salling, Kawasaki, Abercrombie, Toguchi and Carpenter — say they needed the budget worksheets to make an intelligent decision on the budget.

BUT SODETANI this morning said the dissidents failed to show how the budget worksheets qualify as "public records."

"There is no evidence to indicate that the worksheets are official entries . . . or documents received 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 Senate."

Sodetani, in his oral ruling, acknowledged that Cayetano was correct in arguing that the worksheets are important to understanding the budget bill, but "the only issue is whether these documents are public records and open to public inspection."

None of the six was allowed to participate in the five days of budget negotiations with the House.

THREE WEEKS AGO, the dissidents tried to take over the Ways and Means Committee but failed. Wong punished the six by removing them as committee chairmen and from the budget talks.

The dissidents were joined in their lawsuit by Common Cause/Hawaii, the citizen's lobbying organization. Common Cause is still contemplating another lawsuit against the Legislature, seeking clarification about whether the Legislature can bar the public from strategy sessions on the budget.

During yesterday's 90-minute court hearing which was continued this morning, Dennis Goda, deputy budget director, testified that the budget worksheets are "vital" parts of the budget because they help his office determine what the Legislature allocated for certain programs and agencies.

Goda said the budgetary documents are prepared by the staff of the House Finance and the Ways and Means committees and flesh out the raw data in the budget.

Cayetano, who represented the dissidents in court, said the 159-page budget is merely a summary of numbers which are meaningless without the worksheets.

BUT DON GELBER, attorney for the state Senate, argued in his memorandum that the worksheets 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' request.

But Cayetano this morning argued that the only "public records" exempt from public disclosure are "those that invade the right of privacy of an individual or which directly pertain to criminal litigation."

IRS Probers Sued Over Office Raids

By Lee Catterall
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 Sorvice 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.

SAT. NOV 2 0 1982 SB H

Tax Data Admitted

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

WED OCT 27 1982 SB H

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 Akahane.

"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, than 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 Democrats-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 Stu Glauberman
Star-Bulletin Writer

Marilyn Bornhorst today accused fellow City Council member Hiram Fong Jr. of violating privacy-protection provisions in the City Charter and state law by using confidential personnel information in his political advertising.

Bornhorst who faces Fong in the District 5 (Manoa-Waikiki-Makiki) Council race, today asked 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 Charter Commission — in the first of a series of anti-Bornhorst campaign ads that appeared in Friday's daily newspapers.

Bornhorst said she submitted the names after Council Chairman Rudy Pacarro invited her to attend a "private executive session" last year to interview persons being considered for the Charter Commission.

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

BORNHORST told the city Ethics Commission that the names she submitted "were later either given to Hiram 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 City Council have violated the charter and state law," she said in her complaint.

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

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

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

"This is a campaign tactic calculated to draw me into a name-calling contest with him. His objective is to turn an issue-oriented campaign into a shouting 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 pilau politics and I won't have any part of it," she said.

Court Decisions 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 Abscams."

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

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

There never has 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 Intermediat 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

FRI OCT 1 1982 08 14

By Pat Guy
Star-Bulletin Writer

Following the lead 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 Judge Harry Tanaka said the Lester ruling and a companion case "force my reluctant concurrence."

Tanaka said he agrees with the minority 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 Judge Walter Heen in agreement, overturns a decision by Circuit Judge Simeon Acoba involving two defendants in the massage parlor bribery cases.

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 19 counts of bribery and Okubo, a city fire captain, is charged with seven 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 "last obstacle" in the way of a trial for the two defendants, according to Deputy City Prosecutor Ed Kubo, who is handling the 13 bribery cases.

"I'm on Cloud Nine 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 weeks. 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.

BRUCE 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 Lum 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 Lum 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 provision incorporated in the constitution after the 1978 Constitutional Convention.

Ogata and Menor have been replaced on the high court by Frank Padgett and Yoshimi Hayashi.

BURNS WROTE in the Okubo-Yamamoto decision released yesterday that a person has no reasonable expectation that what he says to another person will not be disclosed to someone else. He therefore cannot expect that 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 tapings 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 embrace the rationale of Justice Nakamura in his dissenting opinion in Lester," Tanaka said.

He said police had "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.

In Hawaii...

Friday, October 1, 1982 Honolulu Star-Bulletin A-3

Nature of privacy at issue in appeal over police tapes

By Tom Kaser
Advertiser Staff Writer

When two people are having a conversation is it 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 Kecaumoku Street.

Acoba ordered that electronic surveillance of the conversations — both sound and videotape — be suppressed at their trial, which is pending while Acoba'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 taping was legal — but only because the conversation in this case took place outside, in a public place.

Checking Records of Welfare Recipients

TUE JUL 13 1982 SB H

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. Editorial

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 SB M

By Pat Guy
Star-Bulletin Writer

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 not at the scene violate Kandee 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 conversation between Kalima and two officers who were posing as "dirty 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 officers 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 off-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 a recording was the most reliable 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 "included the risk that the offer would be accurately reproduced in 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 ear of the 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 Kubo was not available for comment on how Kanbara's ruling will effect 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.

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Acoba rules out hotel room tapes in court

By Ken Kobayashi
Advertiser 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, 58, is charged with giving eight capsules of the drugs amobarbital 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 prosecutors probably will ask the Hawaii 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 Hawaii 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 Hawaii'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 when she asked him what he wanted, he replied: "Sex."

Secrecy Criticized on Prison Report

SAT APR 3 1982 SB H

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 Pat Guy
Star-Bulletin Writer

Honolulu psychiatrist Pershing 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 Simeon 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 Yeoth, 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 the 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 she "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 Keoni 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 to bring some medication.

The agents set up their surveillance equipment in an adjoining room and monitored Sundberg's meeting with Lo after his 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 Alu 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 Even Confuse the Agents

THU OCT 15 1981 SB H

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.

"The 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 reporter, "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 persuasive 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.

THU SEP 17 1981 SB H

'Paper Trail' Could Help Track Down a Proposed Project

By Stirling Morita
Star-Bulletin Writer

THERE are many things in public records 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 willpower to pursue the matter.

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

When a developer wants a change in land-use classification, he must file a detailed application with the state Land Use Commission (Room 1795 of the Pacific Trade Center). From that 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 applications are filed with the planning offices of the various counties. In Honolulu, the Department of Land Utilization (in the Honolulu Municipal Office Building, 650 S. King St.) processes permits and rezoning requests.

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 Kamamalu Building, 1010 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 of the Kalanimoku Building. People must serve themselves in the Bureau of Conveyances. The first number, which is five digits long gives the book number and the second number, after the slash, gives the page to look up. In Land Court, ask the clerk behind the counter to get the document for you.

The deed will have the parties to the transaction and sometimes the value of the property changing hands (which, if not disclosed in the deed, might be in a mortgage that follows the deed). If the price is not disclosed, the conveyance tax usually can be multiplied by $2.00 to figure out the value. (The $2.00 figure is calculated from the conveyance tax rate of 5 cents for 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 word of warning is that in the 1960s, the state used a different taxing formula, identified by the letters "RS." A tax official can tell you how to compute the value of the transaction under the RS system. Conveyance taxes are identified by the letters "CT."

While at the bureau or Land Court, one can also check the grantor-grantee indexes for any names or corporations that might

those found in connection with the search. In every financial or real estate transaction, there is a grantor and a grantee.

Bureau records have been cross-indexed for 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 included in tax records now with the county governments. In Honolulu, the real property taxation office, where Oahu property books are, is located on the second floor of the Model Progress Building, 1188 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 map keys. The zoning or land-use-change applications will give tax map keys, which one looks up. The field books will list ownership for a number of years, including conveyance taxes (a form of tax that generally discloses 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 parcel to see if there are patterns of speculation just before the filing of the application or a number of transactions among the same groups of people.

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

When reviewing the list of landowners, one probably will find additional corporations or partnerships. This means hooking it back to the state Department of Regulatory Agencies to check the persons involved with those corporations or partnerships.

Also check the tax valuation of the land in the field books and see if it is similar to nearby parcels.

INCLUDED IN THE field books will be numbers like 0)000/000 or Doc. 00000. The first one is a listing for the deed or conveyance document, which will be in the state Bureau of Conveyances on the first floor of the Kalanimoku Building, the new state office building just mauka of City Hall.

The second number, with the word "Doc" before it, means the conveyance document will be in Land Court, which also is on the

Another thing to check is the campaign donation reports of politicians who will have power over the land-use decision for the project. See if the developer, its officers, or its attorney have been giving money to the politicians' campaigns, which may have an influence on their votes.

The campaign reports are located in the Campaign Spending Commission office in the diamondhead end of the basement of the State Capitol. On the Neighbor Islands, copies of reports are filed with the county clerks.

Another thing to find out is if there are have been a number of lawsuits involving the companies or individuals. This can be done by checking indexes in the clerks' offices of Circuit Court (the first floor of the old Territorial Office Building at Punchbowl and King streets) and federal District Court (on the third floor of the Prince Kuhio Federal Building, Punchbowl Street and Ala Moana). There may be a pattern where the company has failed to perform construction or has been involved in financially troubled projects.

IF THE SUPPORTING documents to the zoning or land-use application do not provide enough information about availability of water, adequate streets, sewage and other services, be patient. A number of government agencies have to review the application and give their comments, and as the application winds its way through the bureaucracy, additional information is added to the application files from the various agencies.

A check of various agencies might prove helpful. For example, 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 then again it might provide you with adequate information or background.

And if the transactions are complex, be prepared to go back to the Department of Regulatory Agencies to start the process all over again.

City Uses a Classified System

By Stirling Morita
Star-Bulletin Writer

CERTAIN types of documents, reports and data used in the city are of a sensitive nature and its confidentiality must be preserved.

"Confidential documents are those that disclosure by unauthorized persons may result in compromise of plans or placing the city in a bad light."

Those words were contained in an October 1979 memo to all city department heads from Edward Y. Hirata, who was then city managing director.

The wording was suggested by the Civil Service director at the time, Harry Boranian, who patterned it after military guidelines on confidential records.

Hirata's memo is an interesting contrast to stated city policy which says:

"A free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

"Therefore, the managing director, while mindful of the right of the individual to personal privacy, hereby finds and declares that access to information concerning the conduct of city agencies is a fundamental right of every person."

That is the lead-in language of the first specific guidelines by a Hawaii government unit defining which records should be open or closed to public scrutiny.

It was drafted by Richard K. Sharpless, Hirata's predecessor as managing director.

UNLIKE ANY OTHER government body, the city has separated its public records from those that the public is not allowed to see.

This is because of an ordinance adopted in 1978 by the Honolulu City Council after then-Councilmen Kekoa Kaapu and Wilbert "Sandy" Holck had troubles in getting copies of consultant contracts awarded by the Board of Water Supply.

It is almost ironic that an ordinance adopted in the spirit of opening up government records has generated administration rules that say what types of records the public cannot see.

In his 1979 memo, Hirata was distributing guidelines for the handling of confidential records.

Hirata said those documents should be kept in a separate, secure location, stamped "confidential," have a control number which is recorded on a log so officials can keep track of the records. Those documents should only be released to those persons with a need to know, Hirata said.

Before the procedural guidelines were set, the various city departments returned and certified lists of various records under their control that should be restricted or closed to the public.

SOMETIMES, THE confidential record classifications appear contradictory.

For example, the corporation counsel's office and the land division of the Department of Public Works said outside appraisals of the value of land to be condemned or purchased by the city for parks and rights of way are avaluable to the public once the land is conveyed to the city.

But the Honolulu Board of Water Supply said in-house appraisal reports of land to be purchased or condemned for rights of way should never be public records.

Another example: the Neighborhood Commission considers its budgets to be confidential until they are approved. No other department cited budgets as confidential records, and the Budget Department said it has no confidential records.

In December 1978, Gerald L. Mann Jr., then director of Data Systems, cautioned against including license or permit applications under the confidential records category of the administration's rules and regulations.

"This is a very inclusive requirement which, if interpreted literally, would mean that a number of licenses and permits and liquor licenses would be in conflict with the rules and regulations," Mann said. "A particular concern to this department is the automobile license information which is given to automobile dealers to assist them in manufacturers' recalls to correct production deficiencies.

"I will assume that requests for information to be provided to the public for these types of purposes, which are in the public interest, will be considered acceptable under the rules and regulations."

THE CITY BASED that portion of the rules involving licenses and permits on a 1959 House Judiciary Committee report on the statutory language governing the definition of public records. It was Hawaii's first public records law and has yet to be changed.

The House Judiciary Committee said it believed that confidential records should include "examinations, public welfare lists, unemployment compensation lists, applications for licenses and other similar records."

This legislative intent has led the city Building Department to declare that applications and plans for building permits are not open to the public until they are formally approved.

The House Judiciary Committee report did not mention permits, although the city rules and regulations have interpreted the report to mean that confidential records would include applications for licenses and permits.

In arguments against making building permit applications and plans public, city attorneys have cited the Judiciary Committee's report involving applications for licenses and possible trade secrets.

(The Congressional handbook on the federal Freedom of Information Act says trade secrets data include such things as processed, formulas, manufacturing plans and chemical compositions.)

However, city officials acknowledged, the lack of availability of plans and building permit applications could mean a more difficult time for community groups which intend to oppose construction of a high-rise building or housing project in their neighborhoods.

GOVERNMENT RECORDS of motor vehicle registrations were considered public for many years, but were closed in May 1979, making Hawaii one of few states to bar public access to such records.

Ironically, the closing of the motor vehicle registration records was prompted by a Neighbor Islander's request to the state ombudsman's office to get information on

a vehicle in Honolulu.

The ombudsman's office asked the attorney general for a legal opinion on the matter, and a deputy attorney general said the motor vehicle registration records could violate the privacy of an individual and could be sealed off to the public. The informal legal opinion was sent to the finance directors of the various county governments and the registration records were closed.

A Star-Bulletin reporter complained to the ombudsman's office about the closing of the records, noting a 1967 New York federal court decision that said such records were public documents and could be sold for mailing lists. The ombudsman's office asked for another attorney general's opinion, and another informal opinion affirmed the previous one.

Once the county finance directors closed the records to the public, officials immediately found problems because towing companies which are required to notify car owners that their vehicles had been towed away did not have access to the information and could not contact the owners.

This year, lawmakers passed another measure that requires a company or person to post a $25,000 bond and swear in an affidavit that he will not disclose the information to others.

NEWS REPORTERS in the past have relied on such records. A 1976 news story revealed that two University of Hawaii basketball players received cars from Cutter Ford for little payment, but that the cars were still registered in the original owners' names.

In responding to inquiries by the managing director's office, several city departments said they had no confidential records, other than those involving their employees and personnel records. Those departments were the Department of Land Utilization, Budget Department and the mayor's office.

The city agency listing the most confidential records is the Police Department, which considers most logs, reports, investigative files and arrest ledgers as confidential documents.

Police logs have created a controversy between Big Island police and the news media.

In May, the Big Island Police Commission and Police Chief Guy Paul established a "streamlined" police bulletin, excluding the names of accident victims, the value and amounts of stolen property or the amount of seized drugs and other details.

Chief Paul said the police bulletin was changed to save the county government some money. He has said the less informative log will not deter enterprising reporters willing to do some legwork by calling the different police stations around the Island. Paul also said the new procedure would cut down on possible invasions of victims' privacy.

The news media, led by the Big Island Press Club, protested the new daily bulletin. The media have said the deletion of information from the log would inhibit reporters in gathering information about crimes. For example, the media said, because some remote Big Island police stations have their telephones answered by tape recordings, the new procedure would greatly slow down or inhibit the flow of information.

Since that time, the police have reversed their position, including information about the value of stolen property and the amount of drugs seized in cases on the bulletin, but it still does not list names of accident victims.

THE BIG ISLAND incident was not the first time that police records have been the topic of controversy involving the news media.

In 1974, the Legislature adopted a law attempting to protect a person's right to a fair trial. That law prohibited revealing of the name and address of a person who had been arrested before that person was actually charged with a crime. Police departments felt the law permitted them to cut off media access to arrest ledgers and other information.

Later that year, a lawsuit against that practice filed by the media on Oahu was successful, with Judge Morito Kawakami affirming the public's right to know through the news media and saying concealment of the records could lead to secret arrests.

But, at about the same time, Big Island Judge Ernest Kubota upheld the law, saying the need to preserve the presumption of innocence of an arrested person outweighs the freedom of the press.

In 1975, the Legislature repealed the law, noting the confusion left by the contradictory rulings by the two Circuit Court judges.

In most instances, various county charters — the ruling documents for the county governments — do not coincide with the state public records law. Many of them say all county records are open, with exception of police and prosecutor's files. The Hawaii County charter is silent on whether police files are exempt from the county's public records provision.

IN NOVEMBER 1978, the Honolulu Police Commission drew protests from the news media and the Honolulu Community-Media Council when the commission refused to release the names of police officers under investigation for misconduct.

The Police Commission reversed a previous procedure in which police officers under investigation were listed by name on the commission's agenda. The commission decided to withhold the names of police officers who were the subjects of citizen complaints even if the commission found the complaints to be valid.

The Community-Media Council studied the matter, but dropped it after a deputy attorney general's opinion that said the information is confidential because it involves employment histories. The legal opinion was based on the definition of personal records under the state privacy code enacted in 1980 — long after the Police Commission's action in 1978.

Some City Records Not Open to Public

UNDER city ordinance, city departments and agencies are required to file lists of confidential records with the managing director's office.

A city ordinance requires that city departments keep confidential records separate from open records.

Other than personnel records and employment records — which all department consider confidential — the following various city records have been interpreted to be closed to the public at one time or another.

BUILDING DEPARTMENT

—Building permit applications, not to be released until actually issued, and building complaints when the complainant requests anonymity.

CIVIL SERVICE DEPARTMENT

—Employment applications; personnel files; employment eligibility cards; collective-bargaining records; safety and workers' compensation records; Civil Service Commission investigations; and personnel development and training programs.

CORPORATION COUNSEL

—Trial records; family disputes; and Ethics Commission records. Land records, including appraisals, available upon purchase or condemnation of property.

FINANCE DEPARTMENT

—Employees' work and salary records; special audit working papers "to protect both the city and employees subject to special investigation;" motor vehicle registration records; all applications for dog, bicycle, business and liquor licenses and loading and bus stop permits; gross liquor sales reports; liquor employee registration records. Records of bidders of concessions and construction contracts until the contracts are awarded.

FIRE DEPARTMENT

—Examination material used to certify persons who install fire-extinguishing systems and investigators' reports on causes of fires.

HEALTH DEPARTMENT

—Ambulance report forms; city employee physical examinations; and reports on police cellblock custody cases.

HOUSING AND COMMUNITY DEVELOPMENT

—Relocation payment records; applications for federal rental housing subsidies; and developers' statements of qualifications and financial responsibility.

OFFICE OF HUMAN RESOURCES

—Personnel disciplinary information and participating company records at the Honolulu Job Resource Center.

OFFICE OF INFORMATION AND COMPLAINT

—Complaints from persons who request confidentiality.

MANAGING DIRECTOR'S OFFICE

—Personnel records; strike contingency plans; internal investigation reports and memorandums; and internal labor management.

NEIGHBORHOOD COMMISSION

—Applications; proposed budgets until approved and Neighborhood Board evaluation reports until released by commission.

MEDICAL EXAMINER

—Reports dealing with autopsies and investigation of deaths.

POLICE DEPARTMENT

—Logs of daily activities, radio calls and arrests; applications for driver's license and permits to carry firearms; internal investigation files; minutes of executive sessions of the Police Commission; training reports and records; crime information bulletins; expenditures for police undercover intelligence operations; parolee information; police ride-along program records; complaint reports; highlights of major criminal cases; studies on Waikiki hotel burglaries, closed-circuit surveillance and false alarms; helicopter and task force reports; juvenile records, dance hall and dance hostess licenses; found property log and evidence log. Reports in records division available upon issuance of court subpoena.

DEPARTMENT OF PUBLIC WORKS

—Files that involve lawsuits; trade secrets file; and consultant records of persons offering unique or different procedures. Land appraisal reports are made available upon purchase or condemnation and consultant contracts are to be released upon completion of project.

PROSECUTING ATTORNEY

—Felony criminal case files; investigative reports; informants' information; and criminal history abstracts.

BOARD OF WATER SUPPLY

—Records relating to lawsuits; consultant contracts which involve trade and business secrets; delinquent billing lists; daily cash payments register; contract payment schedules of consultants; in-house appraisals of land that the board wants to buy. Also various studies until completed and approved by the board.

—Stirling Morita

The Public Right to Know vs. Privacy

In Conflict over Providing Information

Balancing Act a Tough Task for State

By Stirling Morita
Star-Bulletin Writer

ABOUT three years ago, a state employee questioned whether a listing of his name in the state government telephone directory could be a violation of his right to privacy.

The employee was concerned that someone might be able to determine how much he was earning by guessing his civil service ranking from the job title placed next to his name in the directory. The state government considers public employees' salaries, other than those of officials which are set by statute, to be none of the public's business.)

The result was a several-month delay in the delivery of the 1978 telephone directory while a deputy attorney general studied the matter. State Comptroller Hideo Murakami said the attorney general's office gave an opinion that the listing in the telephone directory did not violate the employee's right to privacy. The directory was then distributed.

About the same time, a person called the state ombudsman's office in an effort to locate a friend who was working somewhere in the state government.

The simple request touched off a lengthy procedural debate, lasting until May 1980, although, in a short period of time, the person was put in touch with the employee.

The ombudsman's office contacted the Department of Personnel Services (DPS) to see if the employee could be located through some sort of master employee list, but the department only had employee lists for each department.

THE STATE OFFICE of Information was later asked to help, and it finally found the employee by calling the personnel officers of the various state departments. The employee was contacted and was put in touch with his friend.

The immediate problem was solved, but the ombudsman's office realized there was a larger question left hanging: How is the public to know who its public employees are?

The ombudsman's office talked to the Department of Accounting and General Services (DAGS) and was told that an alphabetical list of all state employees existed, but that it was a computer printout of employees to be used only for tax-reporting purposes.

DAGS and DPS questioned whether release of information

from DAGS' computer printout or DPS' lists could invade a state employee's right to privacy.

An attorney general's opinion was requested, and the ombudsman's office noted that the state telephone directory that is available to the public listed employees and their general job descriptions. The problem was that the directory is not updated annually, and some state employees are not listed because they are in the field or do not have a telephone number specifically for them.

Eventually, a compromise was worked out with DAGS allowing state telephone operators to use the alphabetical list based on the employee tax printouts, excluding salary, tax and other personal information.

THESE ARE examples of how the concern for privacy conflicts with the public's right to know.

Ironing out the ruffles between privacy and public records is no easy task, but state officials believe accommodation between the two will come eventually.

In 1978, voters approved an amendment to the state Constitution which established that no person's right to privacy should be invaded without some strong state interest. However, a Constitutional Convention committee said this should not interfere with traditionally open records under the

state Sunshine Law, or hamper government agencies from collecting information about individuals.

The Legislature moved quickly to implement the constitutional provision by way of a privacy code called the Fair Information Practices Code in 1980. Legislators said they acted swiftly on the matter because they wanted to avoid allowing the courts to interpret the constitutional provision to mean that persons could smoke marijuana in the privacy of their homes, thereby paving the way for legalization of marijuana.

The privacy code restricts outsiders from viewing records involving the educational, employ-

ment, medical and economic histories of a person unless that person give his permission. The vague portion of the privacy code is the additional definition of a "personal record" as "items that contain or make reference to the individual's name, identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or a photograph."

THE PRIVACY code also allows an individual to have access to certain records about himself, except for law enforcement and other investigation records.

For example, a Star-Bulletin reporter asked the Hawaii Housing Authority last year for the names of persons who received low-interest Hula Mae mortgages, backed by state revenue bonds. But the agency turned down the request because the names were contained in financial files and inspection could invade the borrowers' right to privacy.

Previously, state officials were willing to provide information about the salaries of persons hired or appointed to high administrative posts. But in the past two years, that practice was reversed and department heads have refused to divulge that information, citing privacy concerns and saying release of the salary figures could cause morale problems among employees of similar rank.

In support of withholding government employees' salaries, state attorneys point to a 1976 federal court decision which said portions of a U.S. Civil Service Commission report on personnel management should not be disclosed under the federal Freedom of Information Act because individual employees' job classifications, salaries and overclassifications were included in the report and were considered of a personal nature.

ALTHOUGH THERE has been no major conflict between the right to privacy and the need for open public records, some officials — apparently concerned about the penalties for willingly invading a person's privacy — have been closing up records.

One state official put the concern this way: "It is much easier to have you (the news media) sue for no damages (for release of records) than have someone who feels his privacy has been invaded to sue for damages."

State Ombudsman Herman S. Doi, at one time, thought there was too much public confusion about what is a public record and called for itemization of what records should be open or what records should be closed.

To put together such a detailed list "is no easy task," Doi now says.

Attorney General Tany S. Hong agrees and notes that such a list would probably leave off some record, causing even more problems in the future.

But Hong said a clear itemization of records might prove helpful. "It would narrow down the discretion and make it easier for people on the line. Right now, if there is a legal problem, they buck it up the line and it takes some time," Hong said.

THE ATTORNEY general's office reviews requests to see government records on a case-by-case basis, and considering the number of records not specifically open or closed by statutes, there is considerable room for discretion.

A public record is a report or other documents belonging to the state or county governments which contain entries or statutorily required entries or is received or required to be received by a public official. However, records invading an individual's right to privacy are not included in the public records' definition.

This portion of the public records law leads a person to the privacy code which prohibits the release to outsiders of records relating to a person's medical, employment, economic and other histories and excludes investigation files of law enforcement agencies.

The public records law also permits government attorneys to hold back public records because of an anticipated or actual legal proceeding. Also public records cannot be released in violation of any state or federal law or if they are "deemed necessary" for the protection of a person's reputation.

In a 1976 legal memorandum, then-Attorney General Ronald Y. Amemiya said that although state and county attorneys are empowered to withhold public records, "such discretion must not be abused and thus ... will be exercised only when the particular circumstances of the case reasonably justifies its use."

"The attorney general, before exercising his discretion, will require that the complete facts surrounding the circumstances be related to him before he makes any decision in regard to the availability of the records for public inspection," Amemiya said.

The 1959 Territorial Senate Judiciary Committee, in acting on the state's first comprehensive open records and meetings law, said: "Your committee believes that this protection against inspection should not extend beyond the time when an action or proceeding to which the Territory or any political subdivision is a party is actually commenced."

IN TRYING to give department heads some guidance in what public records are, Amemiya said a public record must be:

—A record belonging to the state or counties, and,

—A document required by law, charter or rule and not one kept strictly for administrative purposes of the department, or

—A document required to be filed with government by law, charter or rule and be open depending on the purpose for which the filing was required and the usefulness of the document.

Doi said the public records law could be changed to put the onus on the government to prove that the documents should be withheld from public inspection. Right now, it is up to the individual to sue the government in order to prove that the document is a public record.

People may be reluctant to take legal action because of the costs or trouble involved, Doi said. Maybe government should be the one to go to court to find out if it is public or not, he said.

Also state officials may be reluctant to release records because of the possibility that an individual might feel the release violates his privacy, subjecting

the official to possible fines and jail terms or lawsuits for damages, Doi said. A repeal of the penalties might make government officials more cooperative in meeting public records requests, Doi said.

One of the first things a person is asked when he requests to see a record is "Why do you want to see it?"

BOTH HONG and Doi agree that the reason why a person wants to check a government record is irrelevant.

"If it's a public record, what difference does it make why you want to see a record. If it's a public record, it should be open to everyone," Doi said.

"If it's a public record, the issue should be not what you want to use it for, but whether it is a public record or not," Hong said.

There may be a fundamental, bureaucratic reason for reluctance about issuing public records, Doi said. "To say their records are open to the public is a hassle from their viewpoint," he said.

If records are public, then the department would have to segregate public records from confidential ones, require a clerk to

handle public requests, keep track of the records and keep an account of the fees for copies of records, he said.

"It is inconvenient. They look on it as losing productive work time," Doi said.

Besides the closing of access to records, the amount of information on public documents is diminishing.

In mid-1979, the Department of Regulatory Agencies, in an attempt to encourage people to file corporate exhibits on time, eliminated financing reports and other requirements from those exhibits so that now the report forms only contain listing of officers, directors, addresses and authorized stock.

Hong, who was director of that department before he became attorney general, said the question of trade secrets had been raised about the financial reporting requirement. Companies which set up businesses for each location feared that competitors might learn how lucrative that market area would be by reading their financial information.

HONG ALSO SAID that the financial reporting requirement may have outlived its usefulness. Why should financial reporting be public in one location, the Department of Regulatory Agencies, and be closed to the public in another location, the Department of Taxation? Hong asked.

News reporters used the financial information in corporate exhibits to determine whether a firm was inactive or a sham or shell organization.

The Legislature has made attempts to revamp the state's corporations code to bring it in line with ones that many other states have. Most of the bills legislators have proposed would have eliminated the requirement that original stockholders of corporations be disclosed.

Reporters and others have used that type of information to show the true ownership of companies. For example, if the stockholder information were not available, some corporations which list attorneys' secretaries as their officers — whether by design or convenience — would appear to be owned by the legal secretaries.

Land trusts were created by law in 1978 to ease the problems of transfers of real property upon the death of the owner. However, one result of the law is that the public now cannot learn who the real owners of land in a trust are.

THE STATE of Arizona eliminated secrecy in blind trusts in 1976 after the murder of Don Bolles, a reporter for the Arizona Republic who reported extensively about land fraud and about organized crime figures who used blind trusts to hide their ownership of land and real estate.

In Illinois, the General Assembly changed its land trust law to require disclosure of beneficial owners of property when those owners apply for a benefit, such as a permit, from the government. This was done so that local and state officials could not make decisions in zoning and land condemnations without the public knowing who could benefit from those changes.

In recent years, there have been few lawsuits in Hawaii seeking release of government information.

In 1979, the Honolulu Advertiser sued the Department of Health seeking access to records involving leakage of sewage from the Mililani sewage treatment plant into Kipapa and Waikele streams.

In that case, Circuit Judge Arthur S.K. Fong said the state law is clear that anything in a file is public record, except what is privileged, such as personal financial information.

IN 1974, Honolulu's news media challenged a law that permitted police departments to cut off reporters' access to arrest logs.

Then-Circuit Judge Norito Kawakami ruled the law to be unconstitutional, but Big Island Judge Ernest Kubota upheld the constitutionality of the law.

Kawakami said the news media "in carrying on the business of gathering and disseminating newsworthy information" should have "reasonable access to information from governmental and police sources in the State of Hawaii."

The Legislature, in the following year, repealed the law, with the House Judiciary Committee saying: "Your committee believes that the present law raises the danger of a person being secretly jailed."

Public Finds Path to Records Often Blocked

By Stirling Morita
Star-Bulletin Writer

IF your community group gets wind of a proposed housing project in your area and you want to find out more information about it, you might have a tougher time these days.

For example, you might want to check the application for a building permit and the accompanying plans for the project, but be prevented from seeing them until the plans are actually approved and the permit issued by the city.

Or you might want to find out about the company that is developing the housing project and find less information about the corporation than was available in the past.

Again, you might want to check ownership of the land on which the building is to be constructed. And you might find that a land trust masks the real owners from public view.

Determinations of what records are available and what information they contain have been undergoing subtle changes in Hawaii in recent years, and more and more, public access to records has been either shrouded or cut off.

Building permit applications are being withheld from public scrutiny by city attorneys pending a study of the issues involved.

State regulatory officials stopped requiring corporations to report their finances in mid-1979. And a state law that permits land trusts to keep actual or beneficial owners of property hidden from view was enacted in 1978.

ONE OF THE reasons for closing off government records involves a complex juggling act between the public's right to know and an individual's right to privacy. Government intrusion into persons' lives has led to concerns about privacy, but government officials often use those concerns to restrict from the public certain types of information.

Men have always consciously or subconsciously known that information and power are intimately related. The less information is shared, the more power those that possess such information retain for themselves. The more information is shared, the less value such information has, and thus the possessor of such information retains less power." These are the words of state ombudsman Herman S. Doi taken from in his 1975-76 annual report. In recent years, determinations of what records are available to the public and what information they contain have been undergoing subtle changes in Hawaii, and more and more, public access to records has been either shrouded or cut off. Today, the Star-Bulletin begins a series of articles about the public's right to know, government's concern for an individual's privacy and what is and what is not available for public scrutiny on the federal, state and county levels.

Shrouding government records also results from the government learning that it is collecting too much information about individuals and may no longer need to do so.

As a result, it eliminates requirements for gathering such data.

The federal government opened the door to government records by establishing the Freedom of Information Act in 1966. The act was a change in the government's general philosophy of the handling of public documents. Previously, the burden was on the persons requesting to see records to prove that what they wanted to see were in fact public records. But the federal law reversed that process by making the government justify that such records should be kept secret.

Then in 1974, Congress enacted the federal Privacy Act attempting to dovetail it with the Freedom of Information Act (FOIA). Although it places restrictions on what documents a person may receive through the freedom act, the Privacy Act was established for individuals to find out what information government was keeping on themselves.

SIX MONTHS AGO, U.S. Attorney General William French Smith ordered that federal agencies tighten policies on the release of documents under the FOIA.

Jack C. Landau, director of The Reporters' Committee for Freedom of the Press in Washington, D.C., says Smith's order will restrict severely access by the public and the news media to government information.

Smith said the FOIA was not being used in the manner federal lawmakers intended. Because information kept by federal agencies may be released, law enforcement agencies have difficulties getting information from sources; foreign intelligence services are reluctant to share information with federal intelligence officials; and businesses are hesitant to furnish information to government, Smith said.

A number of proposed changes restricting public access to business or law enforcement records have been shuttled around Congress this year. The Reagan administration has said it will submit its proposed revisions of the FOIA to Congress, but no administration bill has yet been sent to Capitol Hill.

Congressional action this year and late last year would free the federal government from releasing certain Federal Trade Commission documents, Consumer Product Safety Commission information and Internal Revenue

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Information—Public Right to Know vs. Privacy

Attorney General Tany Hong: The state's public records law leaves room for subjective judgments on what should be made available to the public.

State ombudsman Herman Doi: Government officials are becoming more sophisticated about the public records law and no longer withhold obvious public records.

Citizens Find Government Restrictions Make Records Access More Difficult

Continued from Page One

Sunset audit rules. Some 20 other bills are still pending on Capitol Hill.

This means, you would not be able to find out if your toys and cars are unsafe or how the IRS determines whose taxes are audited.

Newspaper organizations charge that many of the changes have been done by congressmen without benefit of hearings—represent a gutting of the Freedom of Information Act.

FEDERAL OFFICIALS have put a price tag of $57 million on the cost to run the government information apparatus, and newspaper groups speculate that the reason for the move to dismantle the freedom act is because it has been used to dig up information that has embarrassed politicians and bureaucrats.

The federal court system has determined that its file cabinets are bursting with unnecessary paper and has stimulated requirements that certain types of court documents be filed. News reporters have found documents such as court depositions and other records helpful to provide background when writing articles on companies or individuals.

An example of the complexities involved in meshing the concepts of right to privacy with the public's right to know is the experience of the Uniform Law Commissioners, which has spent two years attempting to draft a model privacy and public records statute for state legislatures to adopt. (The commissioners are a group of lawyers who attempt to draft uniform legislation for states to adopt.)

For the most part, the Uniform Law Commissioners' draft detailed what records should be public and which ones should be confidential. But when it was issued, various journalists' groups argued that the proposed model act would cut off public scrutiny of traditionally open records.

The proposed model act was sent to the American Bar Association, which tabled action on it. That model act was introduced in the Illinois and Minnesota legislatures, but failed to pass.

IT IS OFTEN news reporters who complain the most when public access to records are cut off or denied by government officials. The news media have been recognized by the courts as surrogates or substitutes for the public, but they do not have any more right of access to government records than the public has.

In other words, what information members of the news media cannot find out will not be passed on to the general public. Journalists leaders from the founding fathers to present-day government officials have often said information is part of the bedrock of a democratic society because an uninformed electorate cannot be expected to make proper decisions.

Tonda Rush, director of the Freedom of Information Service Center in Washington, D.C., says the national trend appears headed toward restriction of public access to records. The service center is funded by The Reporters' Committee for Freedom of the Press and the Society of Professional Journalists, Sigma Delta Chi.

Principally, Rush says, public access to government records is under attack on a federal level from law enforcement agencies, the Central Intelligence Agency and businesses which believe their trade secrets are being divulged by government.

On the state levels, the concern for individual privacy is in conflict with public access to records, Rush says.

SOMETIMES JOURNALISTS' pleas for publicly available records and for open government are viewed as self serving. But, Rush says, it is very often special interests groups on the other side that oppose openness of records.

These special interests groups opposing government openness don't want their or their agencies' malfeasance exposed; don't want to be accountable or have the trouble of dealing with the public or want to protect their business reputations, Rush says.

Some private attorneys use the FOIA to enhance their clients' positions in litigation, Rush says, but the news media have used the act to disclose important topics such as:

—Central Intelligence Agency drug experiments on citizens.

—Federal Bureau of Investigation snooping on college campuses.

—Federal Drug Administration actions benefitting the suit contact lens industry.

Without the Freedom of Information Act, such news articles probably would have never been written and published, Rush says, and the public would be none the wiser.

IN A RECENT article in the American Bar Association Journal, Stuart M. Statler, acting chairman of the federal Consumer Product Safety Commission, criticized the open record and meeting laws of the federal government.

"Openness in government has left much to be desired," Statler stated.

The need for freedom of information and "sunshine" in government proceedings should be evaluated on a cost-benefit basis, he said. The open records provisions of the FOIA puts a burden on government agencies to ensure the accuracy of information it receives from private sources and then discloses, Statler said.

Because attorneys can use the FOIA to help out their clients, Statler said, the "watched" or regulated companies are turning around and becoming "the watchdogs" of the governmental regulatory agencies.

In a 1976 report to the U.S. Senate Judiciary Committee, the U.S. Justice Department said law enforcement agencies believe the Freedom of Information and Privacy acts hinder their investigations.

The Justice Department said sources of information are afraid that their identities can be learned through records detailing the information they provide when released to the public. The sources, therefore, become reluctant to pass on the information the department said.

"Law enforcement officials almost universally believe that the ability of law enforcement agencies to gather and exchange information is being eroded," the report states. "The extent and significance of the information, not being obtained, however, cannot be measured."

UNDER THE FEDERAL Freedom of Information Act, persons cannot see documents generally involving national security; interagency personnel rules; trade secrets; inter-agency memos; personal privacy; law enforcement investigations; federally regulated banks; and oil and natural gas wells.

Other federal statutes exempt disclosure of reports and records of farmers' loans and parity payments; census bureau records; Federal Trade Commission investigations; Central Intelligence Agency structure; tax returns and other Internal Revenue Service documents; information gathered by the Department of Energy from public utilities' records; patent applications; veterans benefits; Postal Service investigations; and employment discrimination records.

In Hawaii, a relatively modern privacy code is pitted against a 1959 law that determines what records the public should be allowed to see.

Territorial lawmakers decided in 1959 that it was time to enact a statute past on public records and open meetings. The public records portions of the law has been virtually untouched since then.

Hawaii Attorney General Tany S. Hong said the state's public records law leaves room for subjective judgments on what should be made available to the public. He said some statutes covering specific topics clearly declare some records as being public and others as being confidential information. Everything that falls in between is in the gray area subject to privacy considerations and the general public records law.

Judging whether a government record should be released is done on a case-by-case basis, and if there is a conflict, it is a matter of balancing one right against another, Hong said.

Hong said he has not seen any major clash between the right to privacy and access to public records.

FIVE YEARS AGO in his annual report, State Ombudsman Herman S. Doi made a plea for a clear delineation of what records in government should or should not be released to the public.

Since then, Doi has backed off his stand, saying that complaints from the public about public records are dropping off. He said he believes that government officials are becoming more sophisticated about the public records law and no longer withhold obvious public records such as rules and regulations from the public.

"No doubt there's a conflict between privacy and public records," Doi said, noting that government experience with the two statutory provisions will lead to an accommodation between the two.

Traditionally, state records such as court files, land-recording documents, corporate exhibits, government contracts and tax assessment books have been in the public domain.

And such materials as juvenile court records, income tax returns, police investigative files and birth certificates have been closed to the public, except to individuals directly involved or their agents.

The Legislative Analyst, the analysis-research arm of the California Legislature, studied the relationship of the California's privacy code and its public records law, which says all government records are open unless forbidden by statute.

The Legislative Analyst's 1900 report found few conflicts between the privacy code and the public records law after reviewing the actions of certain California agencies.

The report notes that the California Highway Patrol stopped releasing the addresses of accident victims, an action that drew complaints from newspapers and television stations. The highway patrol backed off the procedure, but said it reserved the right to withhold addresses in the future.

The Legislative Analyst's report gives an example of how privacy can conflict with the shuttling of information among government officials.

Santa Clara County was the only county in California to enact a privacy ordinance. Because of the privacy ordinance, San Jose's police chief could not give councilmembers information about the arrest and disposition of prostitutes. However, the police chief told the council that it could get the same information by going through the public court dockets, the report says.

WHILE NO SIMILAR study has been made in Hawaii, state officials said there will be a period of reclamation to the state privacy code.

Doi's 1975-76 annual report is used before enactment of Hawaii's privacy code, says democratic institutions are founded on the premise that information should be shared among the citizenry and their representatives for decision-making purposes.

"For unless the citizenry and their representatives are aware of societal problems and the information available concerning those problems, neither is able to formulate sound alternatives and to select the most logical and workable solution."

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Tips on Getting That Information

By Stirling Morita
Star-Bulletin Writer

THE Freedom of Information 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 center is funded by The Reporters' Committee for Freedom of the Press and the Society of Professional Journalists, Sigma Delta Chi. The House Committee on Government Operations also has prepared a publication called "*A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents*".

The FOI Service Center's booklet suggests you generally describe the type of documents you are looking so that the records can be more quickly located.

The booklet suggests that you first make an informal request through the public information office of the department that has the records you want because they may be readily available for inspection.

However, keep in mind that under the law government officials are required to respond only to a formal request for documents.

Federal agencies subject to the Freedom of Information Act must have FOI officers who process the requests. A simple letter giving specifics of the records you want should be sent to the proper agency. The agency may charge fees for searching for and copying documents, but can waive them for journalists, authors and scholars. Reduction or waiver of fees may be granted if the request would "primarily benefit the general public."

The booklet suggests that if the documents are available in an agency office in your area, you might try a personal visit in order to inspect documents quickly and without great expense.

Hawaii residents should call the federal agency's local office to find out if the records they want are kept here. Generally, the agency can tell you where the records are stored and to whom to address your request.

Most agencies have 10 business days (or two weeks) to respond to your request, and in cases where the document search takes a while, the agency is allowed to respond within 20 business days after receiving your letter.

If your request is denied or partially turned down, you can appeal the decision to the head of the federal agency involved by writing a letter.

If your appeal is denied or the agency does not respond to the appeal within 20 business days, you may file a lawsuit seeking release of the documents.

The FOI Service Center booklet provides a form letter that you can use and, in a modified form, it says:

Your telephone number
Your return address
Date
Name of federal agency
Address

To the FOI Officer:
This request is made under the federal Freedom of Information Act, 5 U.S.C. 552.

Please send me copies of (here list the documents you want described clearly, including names, locations and period of time you are interested in.)

As you know, the FOI Act provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. Therefore, I will expect you to send me all nonexempt portions of the records which I have requested, and ask that you justify any deletions by reference to specific exemptions of the FOI Act. I reserve the right to appeal your decision to withhold any materials.

I promise to pay reasonable search and duplication fees in connection with this request. However, if you estimate that the total fees will exceed (state a figure which you feel you can pay,) please notify me so that I may authorize expenditure of a greater amount.

I will appreciate your communicating with me by telephone, rather than by mail, if you have any questions regarding this request. Thank you for your assistance, and I will look forward to receiving your reply within 10 business days, as required by law.
Very truly yours,
Your signature

The federal Privacy Act procedures are a little different. You can request a federal agency to check its central and regional files for records about yourself. Fees for searching for documents are not charged, but duplication costs will be assessed.

The agency may acknowledge your request within 10 business days, but has up to 30 days to provide access to your records. In your letter for a request, you should properly identify yourself, listing your full name, Social Security number and date and place of birth. A notary public should authenticate your signature on the letter and you might want to include a copy of an identification document, such as a birth certificate or driver's license.

A sample Privacy Act letter, put together by the FOI Service Center, says:

Your telephone number
Your return address
Date
Name of federal agency
Agency address

To the FOI/Privacy Act Officer:
This request is made under the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C., 552a.

Please provide me copies of all records about me in your files. To assist in your search, I am providing the following additional information about myself. (Then list whatever additional personal data you don't mind revealing to the agency, such as other names you have used, Social Security number, date and place of birth, places of residence, foreign travel, government and other employment, and political activities.)

If you determine that any portions of these documents are exempt, I will expect you to delete those portions and release the remainder of each document to me.

I promise to pay lawful fees in connection with this request up to a limit of (state a figure which you feel you can pay). If the estimated fees will be greater than that amount, please contact me by telephone so that I may authorize a larger expenditure.

If you have any questions regarding this request, please contact me by telephone. Thank you for your assistance. I will look forward to receiving a prompt reply.

Very truly yours,
Your signature
(Signature should be notarized.)
Full name
Social Security number
Date and place of birth

What Is Public, and What Is Not

THE public deals with government 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 certificates are closed to the public, but are open to the individuals involved or their authorized representatives. Workers for companies that research real estate titles who must verify deaths and marriages for clearances of deeds and other documents are permitted by the state Department of Health to confirm the death or marriage of people who have interests in property. In some instances, death certificates are filed publicly if the deceased's estate has to file a probate action in Circuit Court.

—Divorce filings and information are open to the public in the Circuit Court of the county in which the divorce proceeding has been filed.

—The names of registered owners of a motor vehicles are not released to the public when a license plate number is given, but are open to the owner or his authorized agent. Information on registered owners' certificates, kept in county licensing offices in police stations, is available to persons doing statistical analysis or to towing companies which have to notify persons that their cars have been towed away.

—Applications for drivers' licenses are considered confidential documents, but are open to the individuals involved.

—Citizenship or naturalization records are open to the public in the clerk's office of the federal District Court. Indexes in the clerk's office lead a person to petition books which show when a person applied for citizenship and when he was granted naturalization.

—Voter registration records compiled on computer printouts are open by law and are available in each county clerk's office and in the lieutenant governor's office at the state Capitol.

—Gun registration records, maintained by police departments, are closed 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 histories from the national crime computer to outsiders. However, if the person has been to court on criminal charges, case files on each arrest are open to the public in the Circuit and District courts in each county.

—Accident information, kept by police departments, is closed to the public, although information is released to media and drivers involved in a mishap and their authorized agents. Information on major accidents is released to the news media.

—Stirling Morita

"Men have always consciously or subconsciously known that information and power are intimately related. The less information is shared, the more power those that possess such information retain for themselves. The more information is shared, the less value such information has, and thus the possessor of such information retains less power." These are the words of state Ombudsman Herman S. Doi taken from his 1975-76 annual report. In recent years, determinations of what records are available to the public and what information they contain have been undergoing subtle changes in Hawaii, and more and more, public access to records has been either shrouded or cut off. In this, the second of a series of articles, the Star-Bulletin examines the issue of the public's right to know, government's concern for an individual's privacy and what is and what is not available for public scrutiny on the federal, state and county levels.

Types of Records Open for Perusal

By Stirling Morita
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 for specific references that say whether a certain type of government document 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.

—Financial applications of persons seeking loans from state government, including fishing vessel, agriculture and business loans.

—Pay records and job information of civil service employees. However, the pay of top state administrators whose salaries are set by law is public information.

—Memoranda circulated within a department or between departments, including informal opinions of the attorney general. However, Circuit Judge Arthur S.K. Fong, while ordering the release of Department of Health information on the Mililani sewage treatment plant, ruled that memoranda on file should be shown for inspection.

—Records of persons who apply for and receive identification cards through the attorney general's office.

—Files containing grades and behavorial backgrounds of students.

ETHICS

—Ethics Commission proceedings 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. All other elected officials and state cabinet officials must publicly disclose their financial holdings.

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 submitted 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 from the Department of Labor and Industrial relations.

—Names of complainants 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.

REGULATED BUSINESSES

—Bank examiner information, except for formal actions taken by the Department of Regulatory Agencies division.

—Insurance company rating organizations' 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.

SOCIAL SERVICES

—Records of persons applying for and receiving public assistance from the Department of Social Services and Housing.

—Records of foster care homes identifying children or parents.

—Family Court juvenile records.

—Paternity and adoption proceedings and records in Family Court.

—Petitions for change of name when it would show that a child is illegitimate.

TAXES

—State income and general excise tax returns.

—Conveyance tax records — which show the amount of money for which a house or piece of property is sold.

A Few Suggestions on Obtaining Data

STATE law does not provide procedures that can be followed by persons who want to see 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 anything else.

If you are interested in a certain type of record, you might try to locate which department or agency is responsible for keeping the record. For example, corporation exhibits are kept in the business registration division of the Department of Regulatory Agencies, 1010 Richards St.

Many state contracts are stored in the purchasing and supply division of the Department of Accounting and General Services in the Kalanimoku Building, just mauka of City Hall, although other contracts may be located in the administrative offices of various state departments.

If you have a difficult time finding the department responsible for the record for which you are searching, contact the state information office or the ombudsman's office for assistance.

WHEN YOU ARRIVE at the agency in charge of the records, you should ask an employee about the records. In most cases, the employee will get the records for you, but in other agencies, such as the Bureau of Conveyances, the person serves himself.

If the document is a public record, you may ask for and receive copies of the document. Minimum duplication fees are 25 cents a page, and some agencies may charge $1 a page.

If the employee tells you that the document you seek is not a public record, ask his supervisor. If you believe it is a public document, you might even further appeal the denial of record inspection to the department or agency head.

An appeal of the lower-echelon employee's refusal to release the record to you should be made in writing to the department or agency head. There is no need to say why you want to inspect the record, but in some instances, researchers for recognized statistical compilation companies or educational foundations are allowed to see records that the public is not permitted to inspect.

IF THE DEPARTMENT head denies your request, you can write to him, saying why you think the document is a public record and should be released. In many cases, department heads either already have or will ask for informal attorney general's opinions declaring certain types of documents public information or confidential.

If you receive no satisfaction from the department head, you can ask the ombudsman's office for assistance.

State law permits any person denied the right to inspect or receive copies of public records to sue in Circuit Court for release of or copies of records.

—Stirling Morita

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." Editorial

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. TUE SEP 15 1981 SB H

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 4½ 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 1 1981 AD

By Ken Kobayashi
Advertiser Staff Writer

The city prosecutor's office was dealt yesterday with what it says is a severe setback 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 an appeal is the best remedy at this point."

Kubo said the ruling "considerably" weakens the prosecution's case. He also said if the prosecutors go to trial and lose, they won't be able to try the two defendants again because of the their rights 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 to the recordings, even without a warrant. Acoba, however, interpreted the Hawaii Constitution as barring such tapings.

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 violations 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 cite the 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 1979. Acoba acquitted Hashizume by reason of insanity and committed him to the state hospital.

Suit, countersuit in bugging accusation

By Charles Turner
Advertiser Labor Writer

Charges of illegal electronic bugging of the Hawaii Carpenters' union's leadership have led to a $6 million suit against Maui Contractor Walter Mungovan, who counter-sued with a $1.5 million claim of his own.

The two suits were filed this month in Circuit Court.

Walter Y. Kupau, union financial secretary, brought the first suit, claiming that Mungovan, who heads C & W Construction Co., taped a telephone conversation on Feb. 27 after allegedly telling Kupau "their conversation would be private and confidential . . . ."

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

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

The suit against Mungovan also named Marr and his law firm as defendants, contending 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 test case involving the state law covering "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 bribery 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, Jossem & 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 withheld from governmental authorities."

Mungovan'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 1980 and accused him of having "substandard wages, hours and working conditions" in his contracting operations.

Mungovan 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 Weinberg.

Mungovan accused Kupau of causing him "severe emotional distress, loss of business income and loss of earnings."

Judge Allows Taped Dialogue as Evidence

THU JUN 25 1981 SB H

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 this month by Circuit Judge Simeon Acoba Jr.

Au yesterday denied a motion to suppress recordings of conversations between an 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 protections against unreasonable searches and seizures. He is preparing a written decision.

The city prosecutor's office, which was outraged 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 Tom 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 (the sale of illegal drugs) with a government agent.

HE ALSO 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.

Au said the constitutional guarantees against unreasonable searches and seizures offer no protection "to a wrongdoer'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

FRI MAY 15 1981 SB H

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 Bel Air Plaza condominium project in Makiki.

The Makiki Community Association is fighting the 70-foot project, arguing that the 40-foot height limit established for the area should apply to the development.

Lim also noted a Circuit Court civil case involving the Pauoa-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 Pauoa.

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 92-50."

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 now 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

TUE MAR 31 1981 AD F

By Sandra S. Oshiro
Advertiser 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 to 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 Advertiser reporter to see a committee report on a controversial condominium conversion bill. The bill was killed by the committee, but it was not readily apparent who voted against it without access to the report.

Common Cause/Hawaii, the citizens' lobbying group, subsequently went to court to have the report released. The matter was declared moot 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 Takitani, D-6th Dist. (West Maui-Molokai-Lanai).

"Instead of opening things, it may close them a little bit more," he said, recommending deletion of the section dealing with legislative committee reports.

Members agreed that a committee chairman could circumvent the public disclosure requirement by filing a bill without holding a hearing or circulating a committee report on it.

Rep. Eloise Tungpalan, D-18th Dist. (Pearl Ridge-Pearl City), said she approves of the "language in the bill."

But she said a committee chairman may poll the members and decide not to circulate a report if many of them oppose a bill "because he doesn't want to expose his members."

"IF A CHAIRMAN kills a report because people don't want anyone to find out (how they voted), they shouldn't be here in the first place," said Rep. Robert Dods, D-7th Dist. (Aina Haina-Hawaii Kai).

"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 detered from examining records.

SAT MAR 28 1981 SB H

Committee Studies Disclosure Change

SAT. MAR 7 1981 SB H

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 "... is not directly affect 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.

Editor & Publisher

THE FOURTH ESTATE

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Publisher, Chairman of the Board, 1912-1959

Editor & Publisher Jan 3, 1970

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 witheld 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 issed 15,000 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
Advertiser 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 1978, when the Honolulu Police Commission decided to withhold the names of police personnel who were the subjects of citizens' complaints — even of those complaints found to be valid.

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 misdeeds as unjustified 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 Cobb 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-privacy statutes."

According to the opinion from deputy attorney general Valri Lei Kunimoto, the identities of officers who are the subject of citizens' complaints are not required 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 Kunimoto said.

MON OCT 27 1980 AD F

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

It was not immediately clear from the leg opinion if the commission was in the right in wit holding officers' names in citizens' complaints u held prior to the law's taking effect. The decisio by the commission to keep the names secret wa announced Nov. 15, 1978.

Kunimoto also cited a 1974 Hawaii Suprem Court decision that police department records ar not open to the general public's inspection unles the chief of police agrees to the disclosure.

The court also made a distinction between th general public and parties involved in criminal o civil suits involving police officers. In the latter department records — including internal affair 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 Media Council.

The Media Council yesterday voted to drop its challenge to the Police Commission's policy of keeping its decisions 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 commissioners vote on whether they find the complaints justified. Complaints which the commissioners uphold 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 citizen complaints against them. But since that time, the commission will only reveal the numbers of officers and complainants, 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 Cobb on behalf of the Media Council.

The "Fair Information Practice act limits public access to personal records of government employees. "Other public employees are no subject to public identification 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 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 it.

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's 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.

Circuit Judge Bertram Kanbara heard arguments yesterday from Monick's lawyer — John Edmunds — and state Deputy Attorney General Rick Eichor.

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

Honolulu District Judge Andrew Salz 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 files 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 parties 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 four 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 M. 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 has not yet issued a decision.

Eichor argued that such an administrative warrant is different from a criminal search warrant based on probable cause. Eichor argued that Salz 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 of 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 "bombshell" in the case and the unit's most important evidence.

Edmunds ha filed a similar motion in Honolulu District Court because he was unsure in which jurisdiction to proceed. A hearing there is scheduled for Thursday.

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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 Media Council.

The Media Council yesterday voted to drop its challenge to the Police Commission's policy of keeping its decisions 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 commissioners vote on whether they find the complaints justified. Complaints which the commissioners uphold 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 citizen complaints against them. But since that time, the commission will only reveal the numbers of officers and complainants, 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 Valri Kunimoto 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 persona records of government employees "Other public employees are no subject to public identification fo misconduct. We believe that members of a law enforcement agenc have the same rights as other publi employees," said Kunimoto.

She said the legal definition o "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 it.

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's 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.

Circuit Judge Bertram Kanbara heard arguments yesterday from Monick's lawyer — John Edmunds — and state Deputy Attorney General Rick Eichor.

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

Honolulu District Judge Andrew Salz 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 files 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 parties 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 four 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 M. 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 has not yet issued a decision.

Eichor argued that such an administrative warrant is different from a criminal search warrant based on probable cause. Eichor argued that Salz 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 of 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 "bombshell" in the case and the unit's most importan evidence.

Edmunds ha filed a similar motion in Honolulu District Court because he was unsure in which jurisdiction to proceed. A hearing there is scheduled for Thursday.

Reconciling Privacy and Publicity

Editorial

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 42 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.

Meetings tackle privacy vs. right to know

By Jan TenBruggencate
Advertiser Kauai Bureau

NAWILIWILI, Kauai — How much personal information should the government be able to collect about you?

How much should it share with other government agencies?

How much should it be allowed to make public?

These are some of the issues being considered in meetings of the National Conference of Commissioners on Uniform State Laws. They are meeting all week at the Kauai Surf Hotel, and among the documents they're expected to approve today is a Uniform State Information Practices Code.

The code is an attempt to provide public access to government records while at the same time protecting the privacy of individuals. If it is approved by the Uniform Law Commissioners here, they will go back to their homes in all 50 states, District of Columbia and Puerto Rico, and lobby with their legislatures to have the code passed as law throughout the United States.

Here are some points from the code that tries to balance the individual's right to privacy with the public's right to know.

- The basic premise is that the public needs to be informed and individuals must be able to inspect documents about themselves and to correct errors.
- But there must be limits to openness. Among those proposed: Criminal investigation data; intra-government memos and reports whose disclosure would inhibit operations; details from examinations that would render exams unfair; real estate transaction details; trade secrets and confidential financial data; private papers marked to be kept secret for a specific period; and things like medical information welfare records, tax and personal financial details; and evaluation reports of potential governmental appointees.
- In cases where privacy and the right to know collide, the code lets the courts decide.
- The code would limit government information collection to that authorized by law, and would set limits of file swapping between agencies. Too, selling or renting mailing lists would be banned unless authorized by law.
- There would be criminal penalties for government personnel violating privacy rules, and there would be an Office of Information Practices to monitor compliance.

The information code is just one of nearly a dozen pieces of legislation under consideration. Since under the Uniform Law Commission's rules, each piece must be considered at at least two annual meetings, several will be deferred to next year's session in New Orleans. Some of these deal with health care rights, property rights, revising the administrative procedures laws and preservation of historic sites.

Others may go to a vote today

Here are likely candidates for a vote.

- The establishment of an acceptable definition of death, which is a compromise of proposals by the medical and law professions and the Uniform Law Commissioners' earlier proposals. Basically, it provides for a declaration of death when either the brain is determined irreversibly dead or when heart and breathing have irreversibly stopped.
- Revision of the 1926 Uniform Extradition Act now in 18 states to meet the needs of a society of interstate highways and computers. It would ease up extradition, but would also allow suspected fugitives a judicial hearing to contest extradition arrest orders.
- A law to penalize prisoners who file state-funded appeals that are deemed so lacking in merit that they're frivolous.
- One allowing giant court judgments to be paid in installments instead of in lump sums. In part, the plan is to see that, for example, a person with a medical claim gets money as costs occur instead of all at once. Lump sums are sometimes lost through poor investments, and interest on them can be taxed.
- Providing a body of laws for "planned communities," which now fall somewhere between municipalities and condominium law. The laws would allow for creation and termination of such communities, controls on developers, management regulations and the like.

This week's Kauai sessions are the third Hawaii annual meeting for the 88-year-old organization. It has some 250 members, most of whom are judges, practicing lawyers or law professors. There are at least three from each state and they work for free, with travel and other costs generally paid by the individual states.

They try to develop legislation to solve problems common to all states, and they adopt such legislation in two forms. Uniform codes are those they hope will be passed verbatim in each state. Model codes provide a guide for states, which are not discouraged from amending the model.

Commissioners must spend at least two years in committee meetings and convention sessions on any piece of legislation before it gets to a vote, and sometimes it takes several years.

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

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 7 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 226, the privacy law, was adopted in response to a constitutional convention 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 revealing 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.

Guy Paul
Counsel reviews police policy

Government Records Can Be Corrected, Too

Individuals' Privacy Receives a Boost

By Stirling Morita
Star-Bulletin Writer

Individuals can inspect and correct government records about themselves under the recently enacted state 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.

Newspapers 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.

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

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

OTHER BILLS signed into law by Ariyoshi will:

—Increase personal income tax exemption deductions from $750 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, titled "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.

—Refine the liability of owners of dogs that bite or attack people, placing more responsibility on the owners, but exempting dog attacks on trespassers.

—Increase the amount of general exise 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.

Good marks in implementing amendments

Lawmakers tackle constitutional changes

By SANDRA S. OSHIRO
Advertiser 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 untying 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 hard 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 file with 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 one 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 open the new intermediate appellate court through June 1981; a requirement that a voter's party preference be kept secret and the first-time election of OHA trustees are major reasons why election officials asked for about $500,000 this year for expected expenses; salaries for 76 legislators will go up from $12,000 to $13,650 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 reap

See LEGISLATURE on Page A-4

House Passes Privacy Legislation

FRI APR 18 1980 SB H

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 finger 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-27th Dist. (Kauai-Niihau), 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 constrict 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

Right to Privacy Bills Raise Questions

By Stirling 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-7th Dist. (Kaimuki-Hawaii Kai), said the bill seems 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 licensee's fitness, personnel evaluation and racial background.

THE MEASURE would require that a state agency answe an individual's request for information within two weeks. An individual, turned down on disclosure of information, can appeal to the agency head and later to Circuit Court. If the individual wins the court action, 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 Buchwach, Honolulu Advertiser's executive editor, said: "No enlightened individual can question 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.

The Hawaii Bankers Association; G.A. Morris, representing R.L. Polk & Co.; and Roy A. Vitousek Jr., representing Chevron USA Inc., complained about the closing to the public of motor vehicle registration records.

Morris asked: "Why are we the only state in the country that does not have open vehicle registration records?"

"Because we have a privacy amendment," O'Connor answered.

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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 judically 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.

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Stuart Knight

Secret Service Problems Told by Director

By Stu Glauberman
Star-Bulletin Writer

Suggesting that the U.S. Secret Service is not all secrets, H. 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 counterfeit currency, they face far greater challenges when it comes to protection, or preventing crimes.

Part of their problem is obtaining what he called, "that nasty word today — intelligence" and part of the solution would be curtailing the existing privacy and information acts, he said.

The Secret Service now is providing 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 awesome 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 Lynette "Squeaky" Frommo 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, very deeply.

"WE THINK we should have a little more latitude."

Knight said Congress should reassess the Freedom of Information and the Privacy acts. He said he and 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. "It's a very expensive law to administer — $16 millions a year," Knight said.

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 regulation) 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 social misfits, but admits he doesn't know how to go about it and fears the bureaucracy which would result from federal attempts to control handgun ownership.

Senate bills to make it tougher for criminals in the courtroom

By SANDRA S. OGHIRO
Advertiser Government 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'Connor 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'Connor 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'Connor said that to generate discussion, he introduced a bill to establish certain safeguards against invasion of privacy, as required by a Constitutional [illegible] 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. Patsy 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, 1985, 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 carpool program for its employees; and require that gasohol be used in state vehicles.

Legislators Again Tackle Privacy Bill

By Stirling Morita
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-27th Dist. (Kauai-Niihau), 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 goverment 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, 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.

Legislative 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

THU JAN 10 1980 AD

By JERRY BURRIS
Advertiser Politics Writer

A new constitutional right-to-privacy guarantee could generate 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 as unconstitutional portions of the Hawaii Medicaid anti-fraud law will put a crimp in Medicaid fraud investigations but won't stop them.

Rick Eichor, 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 1978.

BYRNE SAID in a 52-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 $100 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, Eichor said: "Anytime you lose a tool, it's going to hurt you. But it's not going to hamper us that much. The ruling will require that we work a little longer and a little harder but it won't prevent us from making cases."

The "tool" Eichor 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 those records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an intrusion into the right of privacy warranting scrutiny under the compelling state interest standard."

According to Eichor, the ruling will affect Medicaid fraud investigations in that investigators will now have to compile enough evidence to obtain a criminal search warrant — which carries a far tougher "probable cause" standard than the administrative inspection warrant — before searching files for evidence of Medicaid fraud.

IN HIS DECISION, Judge Byrne said 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 "elated" with the decision, which Marvit said "vindicates and protects the constitutional right of a patient's

Tuesday, October 23, 1979 Honolulu Star-Bulletin

Fraud Unit

privacy against this unreasonable intrusion."

Marvit noted that under the 1978 law the only standard the state needed to obtain an administrative search warrant was that the inspection to follow was in the "public interest."

SAYING THE society is concerned 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."

State Ordered Not to Probe Medical Data

MON OCT 22 1979 SB H

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

FRI OCT 5 1979 SB M

The public's rig'.t 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 Mililani sewage treatment plant into Kipapa and Waikele 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 descretion 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

SUN SEP 9 1979 AD F

By TOM KASER
Advertiser Staff Writer

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 called 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 every right to examine taxpayers' financial records for unreported income and other things. Court decisions, he maintains, have in fact given the IRS "the license to fish."

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 taypayers 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 much more general. They indicate what they want you to bring in, but clearly what they're involved in is a carte-blanche fishing expedition to find whatever they can.

"I say this is illegal because it violates the U.S. Privacy Act of 1974. It also is illegal because Congress has authorized the IRS to look into only certain things. The IRS can only verify particular items in your tax return, and it must be specific about what it is looking for. The Income Probe Project violates all of those conditions."

About three months ago Mednick wrote to the IRS objecting to the income probes that are being made on his clients. He said he has yet to receive a reply — and his clients have still heard no more from the IRS.

"The ball is in the IRS's court," says Mednick. "We're not going to do anything more until this is resolved. If the government cannot show me — with court decisions and the IRS Code — how this is legal, I will seek counsel and fight this thing."

Wolf acknowledges that his office has been conducting income-probe audits for about the last eight months, but he won't say how many Hawaii residents have been called in for such audits.

"All I can say is that we're doing it on a random basis to a fairly limited number of people — people like you and me who are not necessarily suspected of anything in the first place," he said. "There is no doubt that this kind of auditing is both legal and necessary."

Wolf said the IRS wants to know more about the nation's "subterranean economy" of unreported income, as has been reported in the national press, and the IRS feels that the only way to gain that knowledge 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, savings account passbooks 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 says Mednick is right when he says 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 income and deductible expense," he added.

Responding to Mednick's "fishing" accusation, he recalled a court case in which Exxon Corporation — also claiming the IRS was fishing — refused to produce financial records the IRS had requested. Ruling in the IRS's favor, 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 wide access to citizen's financial records. Section 6001, for example, says that "whenever, in the judgment of the secretary (of the treasury) it is necessary, he may require any person . . . to make such returns, render such statements, or keep such records, as the secretary deems sufficient to show whether or not such person is liable for tax . . . ."

And Section 7602 says: "For the purpose of ascertaining the correctness of any (tax) return, making a return when none has been made, determining the liability of any person for any internal revenue tax, . . . the secretary is authorized 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 8,300 audits a year in recent years. 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 penalty.

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.

Leonard Mednick
IRS probes 'illegal'

William Wolf
IRS has 'fishing license'

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, [illegible] to adjourn in June, passed a last-minute "privacy" bill intended to end "snooping" 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 175 persons were jammed into jail 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 unhurried restraint. It was not just the free 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

SAT APR 21 1979 SB H

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 head of 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 sets up search procedures for the records of providers of medical servide 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 Eichor, 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 suits 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, 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."

"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 warrants," he said.

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Dr. Robert Marvit, Hawaii Psychiatric Society spokesman, said his society was "extremely concerned about protecting patient confidentiality from the unfettered 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 regulation but government officials must maintain a reasonable sensitivity to the private 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.

Gutting of state ethics law feared in proposed change

FRI FEB 23 1979 AD H

By JERRY BURRIS
Advertiser 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.

Gary Slovin, executive director of the state Ethics Commission, made the warning during a hearing on the bill introduced by Sens. T.C. Yim, Duke Kawasaki, Neil Abercrombie and Richard Wong.

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 Bc

By Helen Altonn
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 teen-agers.

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 teen-agers 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 teen-agers and resultant increase in pregnancies and abortions among teen-agers.

Dr. Roy Smith, of the University of Hawaii School of Public Health, said 28 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 1977 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 the 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, Hawaii State Commission on the Status of Women, American Civil Liberties Union, Hawaii Planned Parenthood and 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 37.5 percent of the fetal deaths and 33.4 percent of the total reported pregnancies, she said.

Bailey R. Center, executive director of Hawaii Planned Parenthood, said teen-agers made up almost 34

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Bailey R. Center, executive director of Hawaii Planned Parenthood, said teen-agers made up almost 34 percent of its patient population in 1977.

"Certainly the pressure of some who would keep health and sex education out of our schools results in uninformed youngsters experimenting with their lives and unaware 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 clearly identified by the young population as willing to protect 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 unless 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 JERRY HARRIS
Advertiser Political Writer

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 a 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 packages 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 would 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 therefore 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 public money would be first reviewed by the s agency with jurisdiction over the matter would then be submitted to the Legislature in form for study and approval or disapproval.

The only bill turned down last night was proposed privacy law. The committee heard o whelming testimony against the bill as propo during an earlier hearing.

The bill will be reviewed before another me ure is introduced next year to put the the consti tional mandate on privacy into effect.

Among other constitutional amendments proved in bill form last night were ones provid for a formal revenue-estimating committee, a review commission, a state motto, a "plain language" requirement in government docume and a constitutional recognition of Kamehame the First's "law of the splintered paddle" as symbol of government concern for public safety

Easy Does It on Right of Privacy

Editorial

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 A.D H

By JERRY BURRIS
Advertiser Politics Writer

It will take some time to transform a new Hawaii constitutional "right to privacy" into workable law, state Senate Judiciary Chairman Dennis O'Connor said yesterday.

O'Connor told 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'Connor 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 news 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 unwieldly, expensive and would work against the public's right to know.

Although O'Connor 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 argument against the proposed privacy legislation came from the attorney general's office. Deputy Attorney General Michael Lilly said the bill is vague and over-broad, burdensome and time-consuming, expensive, of limited value to the public, will erode law enforcement and will not achieve open government.

This last concern was highlighted by media representatives who testified.

Said Honolulu Advertiser Editor in Chief George Chaplin:

"(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 sanctions 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 Heaukulani 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 'unintended' 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.

Michael Lilly, deputy attorney general, warned the committee that the bill is vague, would be administratively burdensome and unduly expensive, will not achieve open government, will 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 lgislation 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 the 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-enacting and thus will be judicially tested and implemented on a case-by-case basis," Lilly said.

"As an alternative, we suggest that the Legislature first enact a general provision against abridgement 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 EITHER 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 Departments of Regulatory Agencies, Health, Accounting and General Services and Taxation.

Newspaper and Big Island Press Club representatives expressed fear that the bill would restrict news media access to public records, thus affecting the public's right to know. They called for equal acknowledgement in the legislation of freedom of the press.

Tany Hong, Department of Regulatory Agencies director, said: "In summary, Senate Bill No. 8 casts a chill upon an agency's disposition to release documents to the public and its duty to implement the licensing laws.

"In order to protect an individual's right to privacy, the public's right to know may be seriously curtailed."

HONG PREDICTED that if the bill is enacted, the state Sunshine Law designed to open up meeting and records of government, would be adversely affected. He said the bill would place a heavy administrative workload on government agencies and prompt them to become "extremely cautious" in releasing information."

Honolulu Police Capt. David Heaukulani said the Police Department opposed the bill because it would "restrict the free flow of information between and among agencies."

Also, based on the federal government's experience with the Freedom of Information Act, it was discovered that because of the fear of being indentified, confidential informants stopped supplying information to law enforcement agencies, Heaukulani said.

In Privacy Bill

Editors Fear Loss of Right to Know

FRI FEB 9 1979 SB H

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 complex 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. Consitution.

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 compensation log

More than 400 cases are still pending before the state Criminal Injuries Compensation Commission because police are reluctant to release information that could help the victims of crime establish their claims, Andrew Chang, state Department of Social Services and Housing director, told legislators this week.

Chang said most of the cases have been pending for over a year, largely because the commission cannot easily obtain the police information.

He said police are reluctant to release investigative reports about criminal cases, from which compensation claims arise, because of the federal Privacy Act.

Because the act prohibits release of certain types of personal information, staff members from the commission must visit the police departments, including those on the Neighbor Islands, to read the reports and report back to the commission.

Chang said if the reports were released by the police department, the cases could be assigned to the commissioners more rapidly.

The commission receives claims from persons (or their estates) who have been injured, killed, or who have suffered losses as the result of certain crimes. After a review and hearing, the commission determines the amount of compensation that the state can award.

Chang said a meeting with Honolulu Police Department officials led to an agreement on the release of certain reports.

"Should the arrangement prove unsatisfactory, the commission will exercise its subpoena power," Chang said, however.

In other Senate committees yesterday, Sen. Duke Kawasaki called for tighter regulation of the harvesting of coral by undersea divers.

Kawasaki indicated that the state Department of Land and Natural Resources had been lax in accepting reports on coral harvesting from such commercial groups as Maui Divers of Hawaii Ltd. without confirming their accuracy.

A department representative said he would follow up on that problem.

In the Judiciary Committee, Chairman Dennis O'Connor said he would introduce a bill to consolidate the state's security forces under the attorney general's office.

He said the state could face a proliferation of security units if the rate agencies were asking for their own guards.

Among the agencies that have asked for funds to start their own security units is the Judiciary, O'Connor said.

Wayne Minami, the new state attorney general, said he was not anxious to head a consolidated security force, but he said a large operation could result in cost savings to the state.

Big Success of Con Con Is Surprise

WED NOV 8 1978 SB H

By Lee Gomes
Star-Bulletin Writer

In what came as a surprise even for delegates, all amendments to the state's constitution approved by the Constitutional Convention were accepted by Hawaii's voters yesterday.

Four amendments—the right to privacy, the transfer of real property taxes to the 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 23 proposals (to give 18-year-olds the vote) 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 14 percent of the voters did not vote on the amendments at all or spoiled their ballots, far less than some at the convention had feared.

AS A RESULT, Hawaii's constitution got its most extensive rewrite yesterday since it was first adopted in 1950.

New are the open primary, a right to privacy, a spending limit for state government, a sweeping series of provisions dealing with Hawaiians, 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 changes approved yesterday are likely to end up in court facing constitutional or other legal challenges.

About 21 percent of those who cast unspoiled Con Con ballots yesterday voted a blanket yes. Twenty percent voted a blanket no, and the other 59 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, 16 percent voted blanket no, and the remaining voted selectively.

Proposal 30, the convention's code of ethics, received 179,958 votes, more than any other item on the ballot. Proposal 27, which requires the

Turn to Page A-6 Col. 1

Right of Privacy vs. Freedom of Press

SAT NOV 4 1978 SB H

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. editorial

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.

FORUM

the Readers' Page

Privacy Amendment Opposed

The Ho. 2

By Kinau Boyd Kamalii

HISTORICALLY, the development of the Bill of Rights in the United States Constitution was an affirmative statement counter-pointed by the "Bill of Wrongs" enumerated against the king in the Declaration of Independence. When the American colonies rejected the English monarchy, they asserted themselves as a nation of laws and of human rights. Two hundred years ago, to deny the divine right of kings was a revolution.

This summer's Constitutional Convention, however, almost served notice of the divine right of delegates. Although much has already been said and written about what Con-Con did not do, some of their accomplishments are also questionable.

In particular, the proposed amendment to include the "right to privacy" in the state Bill of Rights raises, in my opinion, some very serious questions.

In its entirety, the proposed amendment 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."

THERE IS ABSOLUTELY no way that I would object to the general notion of an individual's right to privacy. In fact, the common law formula that a man's or a woman's home is his or her castle has been substantially strengthened by the U.S. Supreme Court in a series of cases over the last 10 years; the court has held that the "right to privacy" is explicitly guaranteed.

Thus, the right to privacy — as with all of our rights — must be reconciled with the guarantees established in other areas. None of our rights are absolute; reasonable limitations are imposed when rights come into conflict with each other.

Therefore, your freedom of speech does not include the right to shout "fire" in a crowded theater when it is not burning. A simpler example is that the freedom of your fist stops where my nose begins."

THE RIGHT TO PRIVACY doctrine has also been used by the Supreme Court to limit the extent of equality under the law.

Opponents of the Equal Rights Amendment have argued that equality of the sexes would require common public restrooms. In Griswold vs. Connecticut, a case heard in 1965, the court ruled that the right to privacy would "permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions."

The essential element of these rulings, however, is that the right of privacy can and must be enhanced

State Rep. Kamalii says the proposed privacy amendment to the Constitution would affect the public's right to know.

without jeopardizing the guarantees of our other rights. The amendment proposed for inclusion in our state Constitution, however, represents a serious challenge to our right to know.

First, consider the implications of this privacy section on recent Sunshine legislation. Under the mandated legislative provisions of this amendment, it would be permissible to argue that all financial disclosure statements, voting records, and testimony presented at public hearings were private. How? This official information could be considered the governmental equivalent to individual checking account balances, voting preferences, and opinions which are private.

There is a substantive difference between the safeguards which are needed for the individual, and the public's right to know about the policies and functions of the government.

Secondly, this proposed amendment would have a profound effect on the access the public may now reasonably expect to have to a variety of informational sources.

DURING THIS ELECTION, for example, I am certain that you received campaign literature through the mail or at your door. It may be said that the candidates invaded your privacy.

On just this kind of argument, the U.S. Supreme Court ruled that government "lacks the power constitutionally to prohibit a person from going door to door ringing the doorbell for the purpose of distributing a handbill."

In effect, the decision held that while it is an inconvenience to be called to one's door to receive a pamphlet you didn't ask for or may not want, this is a small price to pay for the sustenance of a free press and the freedom of speech.

Inconvenience is the key word here. We may be inconvenienced by people knocking on our doors. We may be irritated by unsolicited mail. But the true danger is that if we were not to be so inconvenienced, we would also cut ourselves off from all information.

Unless we have access to and keep ourselves open to information, our ideas and opinions become static. We have guaranteed ourselves the ultimate privacy of the grave where we neither know nor act.

MOST IMPORTANTLY, the proposed amendment does not, I feel, address the kinds of privacy violations which do represent a danger to the community. As noted by the late Sen. Hubert Humphrey, "Privacy's environment is continuously being changed by technological advances. Recent technological breakthroughs have made intrusion and surveillance shockingly easy to achieve and difficult to detect."

The sophisticated level of electronic eavesdropping and its extent can only be guessed. Each year, the technology expands and grows less susceptible to public control. Most of these intrusions are fostered by national governments.

Kinau Boyd Kamalii

In fact, these methods have been used by our own government for sometimes questionable purposes. With the investigative tools provided by the Federal Freedom of Information Act, the American public has discovered that the national government has spied on citizens, maintained secret files, and hid its actions from potential Congressional watchdogs.

The amendment which I could have supported without reservation would have been for total governmental openness. Instead, definitions of "compelling state interest" and, ultimately, what information the public has a right to know has become the responsibility of those most likely to abuse such power.

I appreciate what the amendment hoped to achieve. However, because of the implications it holds as an infringement of the public's right to know, I cannot support its passage.

I urge you to vote "No" on Proposition 3 of the proposed constitutional amendments.

Prosecutors Score Two Amendments

WAILUKU, 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 healthful environment.

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.

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.

Club opposes privacy proposal

HILO — The Big Island Press Club yesterday announced its opposition to a proposed constitutional amendment dealing with the "right to privacy."

The oposition 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."

Proposal will give individual the right to proclaim: 'mind your own business'

Between now and Nov. 7, The Advertiser will run a series of articles describing and analyzing the 34 constitutional amendment proposals that will be on the general election ballot. We suggest you clip and save these articles for future reference. Here is a look at:

Con Con Ballot Item 3: Right to Privacy.

By SANDRA S. OSHIRO
Advertiser Government Bureau

yes no con con amendments

Among the most debated proposals to emerge from the 1976 Constitutional Convention was one that would provide for a second and separate right-to-privacy provision in the state's Bill of Rights.

Prosecutors and news executives kicked up the most fuss about it because of fears that the new privacy right would hamper their work.

Supporters of the amendment said those fears are groundless and the courts could settle any disputes that would pit the privacy right against press or speech freedoms or law enforcement procedures.

The state Constitution now includes a provision protecting individuals against unreasonable invasion of privacy.

State courts have ruled that the amendment, a product of the 1968 Constitutional Convention, is limited to invasions by the government in connection with criminal investigations. According to a 1978 Con Con committee report, the courts implied that the right to privacy does not "encompass the concept of a right to personal autonomy."

In addition to the section that guards against unreasonable searches, seizures and invasions of privacy, Con Con is recommending that the Constitution be expanded to include: "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."

With this new right, the committee believes that individuals can sue to protect themselves against invasions of their private affairs, public disclosure of embarrassing facts and publicity placing the individual in a false light.

"In short, this right of privacy includes the right of an individual to tell the world to 'mind your own business,' " according to the committee's report.

Supporters of the proposal have singled out the use of computers to store inaccurate data about a person as one example in which the new privacy right might be asserted.

These is apprehension among prosecutors, however, that the proposal is so vague that it is conceivable it may have adverse effects in areas of crime enforcement.

Richard Wurdeman, city first deputy prosecutor, said he believes the right to privacy could raise "serious questions" about the state's new, and yet-to-be-tested, wiretapping law. Surveillance activities, such as those deployed for gambling activities, could also run afoul of the privacy right, Wurdeman said.

And, as news stories have noted, the privacy right could also strike down laws prohibiting the use of marijuana in the privacy of an individual's home.

Wurdeman notes that few arrests arise out of an individual smoking pot at home, but Alaska's privacy right — similar in wording to the one proposed — was asserted in the defense of an individual arrested for marijuana use and that state's laws prohibiting pot smoking were subsequently struck down.

News media executives also raised objections to the privacy right when the convention was debating the proposal.

To quell fears that the new right would be used to close off access to information about individuals and infringe on the freedom of the press, the Con Con passed a resolution stating that the privacy right is "not intended to violate freedom of the press." Some media executives wanted that incorporated in the text of the proposal, but settled for the resolution, although it has no binding effect.

Reinhard Mohr, executive director of the American Civil Liberties Union, said his group supports the privacy right and believes the media's concern about the proposal is "unfounded." The greater threat, he said, is to individual privacy and the proposal is not a threat to press freedom.

The committee said in its report on the proposal that there may be times when the right of privacy could be overridden. Those cases would include instances in which law enforcement officials would need to share information about suspected wrongdoers, or, in cases in which the press may be justified in writing about personal matters of public figures.

Dangers Are Seen in Privacy Clause

TUE SEP 19 1978 SB H

Editorial

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 19 1978 SB M

By Lee Gomes
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 state its intent 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 Wallace Weatherwax, chairman of the committee on the Bill of Rights, Suffrage and Elections, and said the group was "deeply concerned about 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 14-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 KGMB, KHON, KITV and KHET, radio station KHVH, 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 with convention president Bill Paty 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 Miller, a Harvard Law School professor who deals in privacy law, and was introduced at the convention by Helene 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 section, 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.

THAT 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 similiar language in its constitution since 1972, and in 1975 the Alaskan 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 concern 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 invasions 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 response to a query from the Star-Bulletin that the "major implication" for the press in the privacy amendment in Alaska is that the press has been unable to get a Uniform Public Records act passed by the Legislature.

Christopher S. Dix, attorney for the Hawaii Newspaper Agency, told 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.

Courts often look to a committee report or to floor debates in attempting to discern the intent of the drafters of a law or section of the constitution.

Right-to-privacy makes Con Con ballot

SAT SEP 16 1978 AD H

By SANDRA S. OSHIRO
Advertiser Government Bureau

Voters will be asked to approve an expanded right to privacy provision in the state Constitution, and some newspaper executives fear that the provision could be used to infringe on press and speech freedoms.

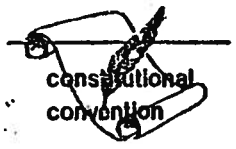
The concern generated an 11th-hour effort yesterday to amend the proposal before it was given a final approval by the convention.

Both the amendment and a later move to kill the entire proposal failed, however, and the provision was adopted along with other proposals that would give the grand jury an attorney of its own and another that will require 12 member juries.

The privacy proposal to be put to the voters says "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."

Christopher Dau, attorney for the Hawaii Newspaper Agency, said editors for both Honolulu daily newspapers became concerned earlier this week about the language in a Con Con committee report outlining the intent behind the proposal.

Part of the report states that the right to privacy could be used to "protect an individual from invasion of his private affairs, public disclosure of embarassing facts, and publicly placing the individual in a false light.



In short, this right of privacy includes the right to sue an individual to tell the world to mind your own business.""

The committee said also the right could be used to "control the privacy of information about an individual."

If the committee had not intended the proposal to hamper the press, according to Dau, it should clearly indicate that in the language of the proposal or in it. report.

Such was the purpose of an the amendment introduced by delegate Helene Hale, submitted on request of Honolulu Advertiser Editor-in-Chief George Chaplin. Under the amendment, the right to privacy would be recognized with "due concern for the interests of free speech and press."

Hale said the amendment was offered to allay fears by some members of the press that the privacy proposal could diminish access to news information despite the guarantee of press freedom in the U.S. Constitution.

Delegate Wallace Weatherwax, chairman of the Con Con committee recommending the privacy proposal, spoke against the amendment. Weatherwax said it was based on an "unfounded fear" on the part of the press.

Weatherwax said it would be left to the courts to determine if there was a conflict between the First Amendment rights and the right to privacy that the proposal would establish.

Its author, delegate Akira Hino, acknowledged that the privacy provision could be "abused as a cause of action against the press." But he said it would be up to the courts to "balance the various competing interests to achieve a sound decision as any dispute between the press and segments of the public it purports to inform."

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 effort is taking place even before third reading," said Hino.

Delegates speaking for the amendment said the added wording would clarify the intent of the proposal should there be disagreement in a court case.

Delegate H. William Burgess said the original proposal unamended could be "construed to give the Legislature the authority to suppress information about public officials."

"By trying to do a good thing, we are going to far the other way and that is seriously infringe on those other rights that are so much part of our democracy," Burgess said.

Delegate Naomi Campbell said there were a number of areas that needed to be explored, including the subject of organized crime. But she said should reporters seek out information about the criminal, underworld, the privacy proposal could be used as a "weapon" against the press.

The unsuccessful move to delete the proposal from suggested constitutional amendments to be placed before the voters in November also brought forth other expressions of fear about the effects of the privacy proposal.

Referring to a similar privacy provision in the Alaska constitution that caused the courts there to strike down anti-marijuana laws delegate Floyd Pulham charged that the intent of the proposal was to promote the "drug culture."

Since Hawaii's drug laws could be summarily declared unconstitutional, Pulham said he could not in "good conscience" vote to retain the proposal. Delegate Yoshio Kojima expressed the same fear, saying that he believed the proposal would give "license" to those who smoke pot in the privacy of their homes.

Weatherwax said in response that the courts would need to decide that question as well. Supporters pointed out, however, that the state could argue to retain its anti-marijuana laws under the wording of the proposal by showing that it has a compelling reason to so.

Delegates, reaffirming a decision taken earlier in the convention, voted 68-26 to retain the privacy proposal and submit it to the voters in November.

Other proposals approved yesterday for placement on the ballot would require that grand juries be provided with their own "independent counsel" to advise them in their work. Another proposal would require that all juries consist of at least 12 members, a provision that delegates supported as a means of insuring that minority opinions be heard.

Privacy Proposal Is Approved in Convention

SAT SEP 16 1978 SR A

By Lee Gomes
Star-Bulletin Writer

The Constitutional Convention yesterday 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."

That language worried the editors of both major Honolulu daily newspapers, who mounted a small last-minute lobbying effort to have the proposal changed.

At the request of newspaper representatives, Helene 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 ease concerns that the privacy statement could restrict the information that newspapers can publish and could lead to numerous lawsuits charging invasion of privacy.

Hale said in offering the revised wording that the original proposal could cause substantial problems for the press.

Naomi Campbell said the original proposal could be used to "harass" reporters, and said that "if the right to freedom of speech and freedom of the press is jeopardized, that jeopardizes the rest of us."

Other delegates 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.

BUT AKIRA 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 changing the proposal could lead to adding "doctors and nurses, schoolteachers, aspiring political candidates, salespersons" and others to the list of exclusions.

Hino 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 "was necessary to have the language as broad as it is." He said the new section of the Constitution would require a "filling-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, because the rights of the press would still be retained and maintained. This is not intended to delete or diminish the rights of the press."

The comments were made in a discussion that the courts may later look to in deciding what the effect of the proposal will be. Several delegates, like Bill Burgess, said on the record that the proposal was not intended to hamper the press.

After Hale lost her effort to amend the proposal, she asked that it be turned down completely, but lost in that effort by a 60-36 vote.

In discussing the objections that were raised by newspapers, Famika Anae said the convention should not vote down a proposal involving "this basic right that we all should enjoy" "because of the hardships (it would cause) on a few."

HALE, WHO HAD earlier supported the proposal because of her objections to the state's marijuana laws, said it "creates an umbrella that everyone can find room under," and said that "maybe we really don't know" what the proposal would do.

Some delegates also objected to the proposal because of the ramifications it may have regarding the state's drug laws. Alaska has similar language in its constitution, and the supreme court there cited it in striking down the state's marijuana laws.

Floyd Fulham said the proposal could be used "to promote the drug culture." And in response to the comment of another delegate that the measure was a "simple little proposal," he called it a "simple little very complex proposal 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 on organized crime."

Other delegates said outlawing the private use of marijuana violated 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 Legislature to enact laws regulating credit bureaus, which some have said can violate an individual's privacy through the large amounts of information they accumulate on computers.

MAKING A POINT—Debate continued at the Constitutional Convention yesterday, with (from left) Robert Taira, John Waihee, Laura Ching and Bill Paty engaged in thoughtful discussion. —Star-Bulletin Photo by Ken Sakamoto.

Convention Okays Right to Privacy

By Lee Gomes
Star-Bulletin Writer

The Constitutional Convention today approved a proposed new section of the constitution protecting the 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 Honolulu's two major daily newspapers, who had lobbied yesterday and today to clarify the proposal's wording.

DELEGATE HELENE Hale said in offering the revised wording that the orginal proposal could cause substantial problems for the press.

Delegate Naomi Campbell said the orginal proposal could be used to "harrass" reporters and other delegates 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.

Akira 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 changing the proposal could lead to adding "doctors and nurses, schoolteachers, aspiring political candidates, salespersons" and others to the list.

Hino 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 "filling 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, because the rights of the press would still be retained and maintained. This is not intended to delete or diminish the rights of the press."

not be infringed without the showing of a compelling state interest."

Advertiser photo by Dennis Yamasaki

How private is privacy? Con Con panel can't say

SUN SEP 10 1978 AD F

By SANDRA S. OSHIRO
Advertiser 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 protect people from such "invasions" as 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 other 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.

T.. Strengthen Constitution

Panel Wants Privacy Section Added

MON AUG 21 1978 SB H

By Lee Gomes
Star-Bulletin Writer

A statement on privacy which could effect several areas of law was approved by a Constitutional Convention committee yesterday for inclusion into the state's constitution.

The proposed new section to the document was introduced by Akira Hino, 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 by 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 Hawaii 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 know.edge.

Some of the state's drug laws could also be affected by the change, the attorney said.

ALASKA HAS similiar 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 statement 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.

In the area of laws relating to t press, the right to privacy of citize who are not regular newsmakers now being considered in cour across the country. Unlike laws volving libel, which have been fair well defined, t e laws concerning t amount of privacy that citizens c claim from the press is still bei examined by the courts.

Adding the privacy section to t constitution might give an addition argument to those suing a new paper or television station for i invasion of privacy, the attorn said. But he said he expected th the press' First Amendment righ would outweigh those contained the privacy statement.

A amplification and clarificati of the privacy section is expected the committee report that accomp nies it, and in the convention's d bate on the matter. The courts som times look to those sources wh interpreting a law or a section of t constitution.

City to adopt rules on access to records

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 fromn 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 proccedures parties can follow to gain access .o 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 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 adresses for commercial and fund-raising purposes as a private record.

"The department," he said, "regularly receives requests from political condidates for lists of names and addresses. For example, the list of registered voters. Once these are sold, they (the department) 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.

APPENDIX L

NEWS ARTICLES
ON
PUBLIC RECORDS AND PRIVACY

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

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").

AD	9/30/87	Accessibility of court documents containing
SB	2/ 5/87	potentially damaging/embarrassing and possibly
AD	1/29/87	false information.
AD	1/28/87	
AD	1/25/87	
AD	9/23/87	Privacy law prohibits the release of names and addresses of public employees for union election.
SB	7/29/87	Letter to the Editor (from Maria Hustace): In support of open government.
AD	7/15/87	Privacy law's prohibition on release of criminal histories resulted in the hiring of a school bus driver with a history of sexual assault.
AD	7/ 5/87	Editorial: In support of a more open government.
SB	4/30/87	Legislation: Making public officials'
AD	3/ 6/87	qualifications a matter of public record.
SB	1/30/87	
AD	4/14/87	Accessibility of business records contained in court documents.
AD	3/15/87	Analysis of Judge Donald Tsukiyama's stance on the public's right to know.
AD	3/14/87	State criticized for misuse of privacy law.
AD	3/ 9/87	Letter to the Editor (from Michael Lilly): In support of open government and critical of DCCA.
SB	11/19/86	Identity of an informant contained in Heftel "smear" report
SB	11/18/86	Release and withdrawal of Heftel "smear" report.
AD	11/18/86	"
AD	10/10/86	Release of confidential investigative report.
SB	10/10/86	"
SB	10/ 9/86	"
SB	2/24/87	Use of confidential documents to defend against sex abuse charges not allowed (U.S. Supreme Court).
SB	2/13/87	Reconstruction of the state privacy law under
SB	1/18/87	consideration.
SB	2/ 7/87	Painters v. DCCA
SB	2/ 7/87	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
SB	2/18/86	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
	3/18/85	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/ 8/85	Editorial re: restoring openness in government.
AD	3/ 6/85	Legislation:
SB	3/ 6/85	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 SB	8/28/84 4/ 2/84	Police use of bugging device upheld by State Supreme Court.
SB	7/21/84	Accessibility of proposals for development projects submitted by private bidders.
AD SB	7/ 9/84 7/ 3/84	Prisoners' rights to privacy--U.S. Supreme Court rules that they have none.
SB	6/23/84	Editorial: Urging Hawaii county police department to open more of its records.
SB	6/20/84	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 SB	5/30/84 4/ 2/84	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 SB	4/ 9/84 4/ 6/84	Accessibility of Legislature's investigative committee reports.

AD	4/ 1/84	Editorial: Raises concern that privacy law is
AD	4/ 1/84	being misused.
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.
	3/ 1/84	expectation of privacy (electronic eavesdropping).
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
	10/26/82	for private interests.
SB	10/ 2/82	Editorial re: court decisions on police tape
	10/ 1/82	recordings as evidence (see SB 5/30/84, SB 9/2/82 and AD 12/9/83).
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.

SB	5/15/81	Building permit applications and plans.
SB AD	3/28/81 3/31/81	Legislation: For the purpose of strengthening the state Sunshine Law by opening legislative committee reports.
SB	3/ 7/81	Legislation: Dispute over interpretation of Right to Privacy and financial disclosure amendments in the state constitution.
AD SB	10/27/80 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 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 SB SB	2/10/79 2/10/79 2/ 9/79	Legislation: Testimony raises various concerns over privacy bill.
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/ 4/78	Editorial: Recommends rejection of a state privacy amendment.
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
SB	9/16/78	state's privacy amendment through con-con.
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	3/18/78	The ACLU opposes the Hawaii Crime Commission re: invasion of privacy in wiretapping.
SB	9/15/77	Panel of journalists, lawyers, etc., discuss
AD	2/27/77	access to public records.
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
SB	12/11/75	records on students.
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.

Honolulu Advertiser

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.

Sunday
Star-Bulletin & Advertiser

November 1, 1987 A-3

Cayetano to release delinquent loan file

By James Dooley
Advertiser 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.


Cayetano

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 insututions.

"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.

The Honolulu Advertiser

Final Edition

Oahu Edition: 35¢
Beyond Oahu: 40¢

Aloha!
Today is Saturday Oct. 31, 1987.

Delinquent loan data a secret; and state's reason also secret

By James Dooley
Advertiser Staff Writer

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.

Warren Price
Falls into a "gray area"

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 Ad-

See Delinquent, Page A-4

Delinquent loan data mired in secrecy

From Page One

vertiser as confidential.

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
Advertiser 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 say 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 sues him for 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.

HLRB: No employee list for union

TUE SEP 23 1987 AD

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

Advertiser 7/15/87

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."

FRI JUL 10 1987 SBH

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 Morita, 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.

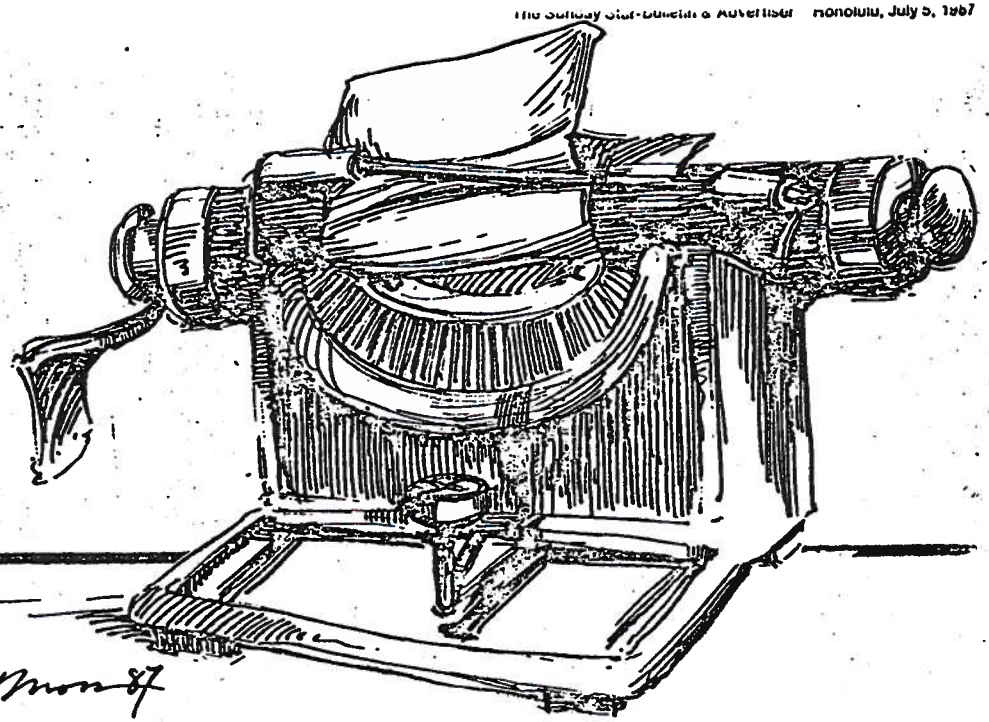
Beverly Keever, a journalism educator, revealed that state agencies have never adopted administrative rules to implement the privacy statute even though the law requiring such rules was passed seven years ago. Instead, the attorney general's office has issued secret memoranda instructing departments 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 overbroad definition of personal records. Not only is an individual's own educational, financial, medical and employment record secret, but so is "any other item that contains or makes reference to the individual's name, identifying number, symbol or other identifying particular."

This restricts access to public records which in any way contain personal information about any individual regardless of whether that individual is a public official, regardless of whether tax dollars are being used to pay the salaries of that individual, with no attempt to balance the public's right to know versus an individual's right to privacy.

Clearly, the proper day-to-day functioning of any law depends a great deal on the bureaucrats who administer it. And the privacy law was written so as to encourage public employees to deny access for fear of being fired. Counter clerks and other front-line bureaucrats tend to err on the side of not releasing information. Given that inherent caution and the overall thrust of the privacy law, the message to custodians of public records is clear: when in doubt, opt for secrecy.

AS A RESULT, when the legitimate concern for privacy — "the right to be left alone," if you will — competes with the equally legitimate goal of openness in government, privacy has the inside track.

There is an appeals procedure through the courts. But the language of the privacy law is so broad that many appeals are doomed to failure. Even where there is a good chance of victory in court, the cost constitutes a chilling effect on any individual or news medium seeking to challenge a decision made under this chapter.

In my view, changes are needed to make more information about public employees public, and to allow public record information to be segregated. That would mean that instead of all information of any kind in a record being restricted from public view just because somebody's name is in it, only that limited information deservedly private would be excised. The balance would be open to the public.

There should be a balancing test to determine whether public interest in disclosure outweighs the privacy interest of the individual involved.

Such changes would bring the state law into closer conformity with the federal Freedom of Information Act. That act is far from perfect, but . . . and at least the federal act attempts to strike a balance, to release to the public as much information as possible while excising only that limited information deservedly private.

SOME OF THE things that have come to light through use of the FOI Act are information on FBI harassment of civil rights leaders, auto design defects, consumer product testing, the salaries of public employees, compliance with antidiscrimination laws, sanitary conditions in food processing plants — the list goes on and on.

I think we could do worse than to use the federal law as a starting point in recasting our own law.

HONOLULU ADVERTISER, JULY 3, 1987

Panel hears testimony on openness issue

By Donna Reyes
Advertiser Government Bureau

A number of people urged the governor's ad hoc committee yesterday to "let the fresh air and sunshine in" on oft-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 us 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 all 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 molestors."

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 548-7505.

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Hawaii's public records and rights of privacy

Governor Waihee's Committee on Public Records and Privacy has begun a series of hearings on what state records people think ought to be open to the public and which ones closed for reasons of privacy.

This is naturally a subject of great interest to news organizations, but it also should command the attention of everyone who cares about keeping the process of government open to the full view of the taxpayers.

It's our belief that the public should have open and reasonably convenient access to birth, death and marriage certificates, accident reports, property ownership and tax records, building permits, motor vehicle registration, drivers' license records, professional and vocational licensing data, findings of environmental agencies, information on state loans and leases, liquor licenses, divorce decrees, wills in probate, salaries of federal, state and local officials.

Some of these are already open and easily available. Some are under the jurisdiction of the counties or the courts. Some are open but available only to lawyers, doctors or insurance agents. Some are public but hard to find. In some cases public inquiry is discouraged.

With the possible exception of personal health records, income taxes and reports of misdemeanors involving minors we'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 1978 State Constitutional Convention, is considered one of the most restrictive in the nation. It has put obstacles in the path of information, given some officials a general excuse for not releasing data that should be routinely available, and contributed further to a spirit of secretiveness among government agencies.

The governor is to be commended for appointing a committee, under Robert Alm, director of Commerce and Consumer Affairs, to look into this area. It has been gathering opinion on the Neighbor Islands this week and has scheduled hearings for next Thursday in the State Capitol auditorium.

This is a chance for those who feel, as we do, that state government needs to open up more, to say so; and also for those who may disagree to argue for more privacy. In any case, it's a rare opportunity to make your views known on the public record.

HonFed abandons court bid to seal suit documents

TUE APR 14 1987 AD F

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 the 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 Josem 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.

'Sunshine' panel starts its work

By Jerry Burris
Advertiser 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 government 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.

Sunshine Law Panel to Hold First Meeting

Star-Bulletin Staff

The City Council's newly formed Sunshine Law advisory committee will hold its initial meeting tomorrow.

Council member 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.

Honolulu Star-Bulletin
Wednesday, March 4, 1987

Donald Tsukiyama and the public's right to know

Sunday Star-Bulletin Advertiser March 15, 1987

By Ken Kobayashi
Advertiser Courts Writer

News Analysis

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."

"When do they ever present an accurate picture?" Tsukiyama replies.

The exchange occurred more than 2½ 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 she said 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 C. Douglas Eagleson, Tsukiyama sealed documents that he said 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, media attorney whose clients include The Honolulu Advertiser, KHON-TV and, at various times, other television and radio stations.

Portnoy says he's been called to represent the media before Tsukiyama far more times 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 as any 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 press wanted the hearings open, he said, was to obtain "fresh news" because "stale 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 Uwaine and his protege 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 Eagleson case. He took exception to the article and headline about his decision barring references 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 a judge. His 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 superceding those of the

See Donald on Page A-10

Advertiser photo by Carl Yim

Circuit Judge Donald Tsukiyama: "protecting the integrity and fairness of (the) proceeding."

From Page A-3

media and public to court proceedings.

For instance, in the 1978 murder-robbery case, Tsukiyama's legal brief said, "The right of the public to attend judicial proceedings is subordinate to the accused's right to a fair trial."

He quoted a U.S. Supreme Court decision that said the function of a free press "must necessarily be subject to the maintenance of absolute fairness in the judicial process."

One longtime acquaintance who worked with Tsukiyama speculates that another factor may be that Tsukiyama was stung over the coverage of Hart's controversial ouster as public defender.

It wasn't so much that Tsukiyama's abilities were criticized, but the praise for Hart may have created the impression that Tsukiyama was not qualified for the post.

As one newspaper article put it, an "innuendo" underlying the flap was that "Tsukiyama is somehow a political hack."

As it turned out, Tsukiyama is generally credited with doing a competent job in running the public defender's office. And as a criminal judge, both prosecuting and defense attorneys give him high marks for the professional manner in which he presides over trials and the way he's handled their cases.

Circuit Judge Robert W.B. Chang, the administrator for the criminal judges, echoes those sentiments. He characterizes Tsukiyama as thoughtful and "very competent."

Chang says he wouldn't necessarily handle disputes involving the media the same way, but refuses to criticize the judge and says Tsukiyama has acted within his scope of authority.

"I don't think he has a bias against the media," Chang says. "I just think he has his own philosophy as to what matters should be made public and what matters should not be made public."

Recently, however, Tsukiyama's view of what should be kept private has gone beyond protecting a defendant's right to a fair trial. In the Eagleson case, Tsukiyama sealed materials to protect the privacy and reputation of witnesses from "unwarranted accusations" apparently relating to "extra-marital relationships."

The papers remain under seal.

But it was the Shibuya case that added a new twist to the issue of open or closed court proceedings.

Shibuya was convicted of attempted manslaughter for 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, on his own, recessed the proceedings and summoned the lawyers to his chambers. The private session was not transcribed by a court reporter.

The judge not only listened to Shibuya give a statement, but he also encouraged her to abide by probation, according to Hart, Shibuya's attorney.

That afternoon, without returning to the courtroom, Tsukiyama filed a written decision placing Shibuya on probation.

City Deputy Prosecutor Constance Hassell and Hart both said they've never seen a sentencing handled in this fashion.

Tsukiyama had indicated that he didn't want the proceedings to turn into a "spectacle," but Hart said he didn't know what that meant.

"What went on in chambers was nothing that in my judgment had to be in chambers as opposed to the courtroom," Hart said.

Neither attorney felt the chambers proceedings were improper, but Hart acknowledged that the public might feel otherwise.

"The public's right to know was frustrated from that point of view. If I was counsel for the public, I'd have a lot of things to say, but from Judy's point of view, there was no reason to."

"I think it was outrageous," says Meda Lind, one of the spectators who waited in the gallery until the bailiff notified them that the court wouldn't reconvene. "It was sort of arrogant that he dismissed the entire community."

Asked later by reporters why he felt he had to go into chambers, Tsukiyama, characteristically, declined to comment.

Reporter: 'Paranoia' got Reagan in trouble

By Ronn Ronck
Advertiser Staff Writer

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 for hostages to Iran.

"The Tower Commission concludes that this adminstration 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 Ian 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.

Angus Mackenzie
'An obsession with secrecy'

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. Records

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 mistrust and trivializes the Legislature's mandate "that the formation and conduct of public policy — the discussions, deliberations, decisions, and action of governmental agencies — shall be conducted as openly as possible."

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

FRI MAR 6 1987 AD F 1

Legislature '87

By William Kresnak
Advertiser Government Bureau

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

Advertiser
Tuesday, March 3, 1987

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.

FOCUS **Government in transition**

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, Heraman Adalist — 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 Waihee 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 Brenneman, 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

WED NOV 19 1986 SB H

By Lee Catterall
Star-Bulletin Writer

A woman identifed 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 plaintiffs — 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 invasion of privacy "of almost unprecedented proportions."

State drug enforcement agent John Madinger in August 1983 made an investigatory 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 10 months of 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.

Star-Bulletin Photo by Dean Sensui

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 Cec Heftel.

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 Heftel 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 properly matters of public record," Lind wrote.

The decision to stop access, he said, "Does not appear to have been informed by an appreciations 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 privary 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.

Marsland: Aide was wrong to give report but his aim was honorable

FRI OCT 10 1986 ADF

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

TUE NOV 18 1986 ADF, 1

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

FRI OCT 10 1986 SBH

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 Heftel's personal life were sent anonymously 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 Waihee's campaign supporters on Sept. 26 at the law firm of Goodsill Anderson Quinn & Stifel included a question about who some people thought might have been responsible for the smear campaign against Heftel.

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 Waihee's candidacy since they seemed to represent a cross-section of the community.

If people thought Waihee 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.

DEFENDS AIDE—City Prosecutor Charles Marsland tells reporters yesterday assistant Rob Luck committed no crime in giving a confidential state report to Chris Heftel. —Star-Bulletin Photo by Ken Sakamoto

Release of 'Smear' Report Violated State Law, Attorney General Says

THU OCT 9 1986 SBH

Continued from Page One

fire or suspend Luck. There are no criminal penalties for such a disclosure, she said.

Luck today acknowledged that he knew his action was "clearly a violation" of administrative procedures and possibly of the state privacy code.

He said he would offer Marsland his resignation today.

Luck said he had discussed the matter last week with Marsland before he was scheduled to meet with attorney general's investigators who are trying to find out who leaked and distributed the document.

"He (Marsland) said I shouldn't have done it. It was wrong," Luck said.

CHRIS HEFTEL 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 permission."

Chris Heftel 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 premeditatedly attempted to ruin my father's reputation."

Luck said he took the action because he didn't think it was fair that the report should be used against Heftel.

"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 Cec," Luck said. "I didn't think it was fair, and he should know about it, that it was an unsubstantiated report."

LUCK SAID he gave the report to Chris Heftel about Aug. 12. Marsland didn't know about its release, he said.

Copies of the report about Cec Heftel's personal life were anonymously sent to news media, campaign organizations and other groups just days before the primary election.

Heftel 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 Waihee.

Heftel believes that Waihee and Republican D.G. Andy Anderson were responsible for the dissemination of the smear campaign. Both gubernatorial candidates have denied the accusation and also have discounted Heftel's belief that the smear campaign caused his defeat.

Waihee today said he was surprised by Luck's disclosure and recommended that state law should be changed so that criminal penalties are levied against anyone who leaks a confidential report.

"It would seem to me from what I know that it was unfortunate that security over the document was such that anyone could get to it and pass it around. We need to ensure that kind of access is not available."

WAIHEE SAID that, if he is 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 documents of a confidential nature.

At Waihee'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 laboratory.

Luck said his family and Chris Heftel's family have known each other because the families were in the broadcasting industry.

"I had heard that it was very possible that the report was available to both Democratic and Republican campaigns. It was from friends and confidants who didn't have direct knowledge of it," Luck said.

He declined to say who might have a copy of the report outside the prosecutor's office because it might affect the attorney general's investigation.

Luck said he had been aware of the report for a while but declined to say whether it was the same copy as the one Marsland said was locked in his safe.

Five weeks before the Sept. 20 primary Marsland met with Cec Heftel to see if they felt they could work together, Luck said.

Marsland has said that, during that August meeting, he told Heftel he heard that a political campaign intended to use the material against Heftel.

Marsland received a copy of the state Investigations and Narcotics Control report about three years ago after meeting with one of the agency's investigators. But Marsland maintained that the copy has been locked in his safe.

Marsland recently battled with the attorney general's office, which wanted his copy of the report. He repeatedly said an independent investigation should be made of the matter and that the attorney general's office couldn't be impartial in the investigation.

He turned the documents over to the FBI, but federal officials say it appears they don't have the power to investigate the leak of the report.

Aide Broke State Law in Release of 'Smear'

THU OCT 9 1986 SBH

By Stirling Morita
and Gregg K. Kakesako
Star-Bulletin Writers

Attorney General Corinne Watanabe today said the state's privacy law has been broken by the city prosecutor's aide who gave a copy of the "smear" report against Democrat Cec Heftel to Heftel's son about six weeks before the Sept. 20 primary election.

Rob Luck, an administrative aide to GOP Prosecutor Charles Marsland, said he gave the report to Chris Heftel because he heard others had copies of the report and were planning to use it against Heftel.

Watanabe said it will be up to City Prosecutor Charles Marsland to determine whether to

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Confidential Records Ordered Kept from Abuse Defendants

TUE FEB 24 1987 SB H

Public

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 corrupting the 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

TUE FEB 24 1987 SB H

By Lee Catterall
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 $80,000 in unauthorized payments from the party's candidate-assistance fund in 1986 when he was program director.

EAGLESON HAS said former party Chairman James Kumagai 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 Dezzani 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 "step on the toes of the powers 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

Legislature '87

Electing an attorney general in Hawaii could lead to more, not less, politics 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.

Price

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.

It turns 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 Keith 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 Alm, 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. Kakesako
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 Stirling 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.


Morita

Other members are Attorney General Warren Price; state Commerce Director Robert Alm; 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 Nissan 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."

Waihee Considers Committee Study of 'Too Restrictive' Privacy Statute

WED FEB 18 1987 SBM

By Gregg K. Kakesako
Star-Bulletin Writer

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

FRI FEB 1 3 1987 SBH

By Gregg K. Kakesako
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.

Metcalf

"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 also is 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 eventually 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 $56,000-a-year job.

Waihee also has hidden behind the shield of the privacy law, refusing to release specific salary figures of his key aides. Instead, his office merely makes public the salary range of the jobs.

Judge Au Won't Permit Viewing of State Settlement Agreement

SAT FEB 7 1987 SRH

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 a division of 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.

THU FEB 5 1987 SB H

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. Records

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
Star-Bulletin Writer

FRI JAN 30 1987 SBH

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 nonprofit 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."

Hiram Kamaka
"I kind of felt hurt"

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:

- Hawaii Rodeo & Roping Association.
- 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."

IN HAWAII

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 Rizalino 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 recently refused a request from a citizens' group for the resume of Hiram Kamaka, the new parks director. Corporation Counsel Richard Wurdeman 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 (1970-73); special assistant to the chairman, U.S. Congress, committees 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 (1979-82); director of technical information, Agency for International Development (1982); 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 administration 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.

By Ken Sakamoto, Star-Bulletin

NEW FACE AT CITY HALL—Linda L. Smith, 39, a former Nixon administration budget analyst, is sworn in as city finance director today during a ceremony in Mayor Frank Fasi's office.

FEB JAN 30 1987 SBH

Judge denies request to seal civil suit's file

THU JAN 29 1987 ADF

By Ken Kobayashi
Advertiser Courts Writer

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 F

By Ken Kobayashi
Advertiser Courts Writer

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 "uncorroborated, false and potentially libelous."

The former employee's attorney, however, says Castle is not 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 that judicial proceedings remain open."

Circuit Judge Robert Klein is scheduled to hear Castle's request Tuesday.

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 cases say they do not recall similar requests in the state — and for that reason, the Hawaii Supreme Court has 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 Adventist Health System-West, and Chris Talmadge, unit manager and assistant director of nursing in the psychiatric department of the hospital, were all sued in September 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 summer after she assisted a patient who complained about the treatment by a hospital employee.

in court

Miller's lawsuit seeks an 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 $10,000.

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 Castle'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 of its business reputation and subsequently to its business operations even though there has been no adjudication of the issues in this case," Castle's attorney, Jared Bissem, said in his written request.

In response, Rapp said it hasn't been established that his client's allegations are "false." Therefore, he said, the judge "must assume that they are true."

"Sound public policies support the practice of keeping judicial records open for public inspection, especially (for) the citizen's desire to keep a watchful eye on the working of public agencies," Rapp said, quoting from a U.S. Supreme Court decision.

Rapp also said any civil defendant could claim that the allegations against the person are false.

"Physicians who are accused of malpractice, individuals who are accused of rape and defendants accused of fraud would all elect to have judicial records sealed if given that right," Rapp said.

The other case pending before Klein involves a suit by two former employees against Andrade and Co. Ltd. alleging wrongful termination of their employment and sexual harassment. The suit by Betty Lizama and James Shirley is also against Harvey Lazar, merchandise manager for the department store.

Andrade and Lazar both deny the allegations.

Klein last month denied a request to seal the documents filed in that case, but Lazar's attorneys are asking Klein to reconsider. Attached to the request is an article in the Hawaii Kai Sun Press that the attorneys say inaccurately reported the allegations in the lawsuit.

The article, the attorneys said, caused a "negative impact on the psychological and physical resolve of Lazar and his family to fully vindicate Lazar in this matter."

Stefan Reinke, one of Lazar's attorneys, said his client wants the records sealed at least until after trial.

"Prior to that time, only one side of the story is told in the pleadings," he said.

He said sexual harassment has been a topic of considerable public concern and sometimes persons merely accused of that allegation are "convicted in the eyes of the public before they have a chance for a fair trial."

The request to seal is also based on charges that the lawsuit allegations are "false" and "scandalous." Michael Wilson, attorney for Lizama and Shirley, has responded that the truth of the allegations is still a disputed issue and the file should remain a public record.

"Defendant Lazar has cited no reason to seal the pleadings in this case other than publicity," Wilson said.

Portnoy said he is awaiting Klein's ruling on Castle's request to see if he will ask permission to intervene on behalf of The Advertiser in the Lazar case. He said he would argue against the request to seal.

"I think in most lawsuits one side or the other would prefer for many, many different reasons to keep the lawsuit private," he said. "If this attempt in two cases were to be successful, it would give encouragement to others to try to close off access to their pleadings, which would leave the public the loser," he said.

"If that happens, the public would not obtain knowledge about the court system and about allegations and claims against various governmental agencies, businesses and others."

Judge Seals Probe of Art Gallery

Says Files Are Not Public Record, Denies Star-Bulletin Access

WED NOV 26 1986 SB H

By Lee Catterall
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 Gallaries-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 Ian 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

Lind 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 Cec Heftel "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 Simonds said.

CORRECTION

The state attorney general's office conducted a two-year investigation that resulted in a civil suit being drawn up against Center Art Galleries-Hawaii but never filed in court. Because of an editing error, an article in yesterday's Star-Bulletin incorrectly characterized the suit as a criminal complaint.

THU NOV 27 1986 SB H I

Report Says the U.S. Government Might Be Violating Privacy Act

TUE JUL 1 1986 SB H

By Adell Crowe
Gannett News Service

WASHINGTON — Uncle Sam may be violating your privacy.

That's the finding of a report, released yesterday by the Office of Technology Assessment, that warns the government may be using the information you supplied it for one purpose to track you down for another.

For example: The federal government checked its vast list of federal employees against the Education Department's files of people who skipped out on their student loans and found 46,860 matches.

This increasingly frequent practice, the OTA report says, "has eroded the protections of the Privacy Act."

"The Privacy Act prohibits the use of information for a purpose other than that for which it was collected without the consent of the individual," according to the report. But, it adds, "New computer and telecommunication applications for processing personal information facilitate the use of information for secondary purposes."

THE REPORT recommended Congress decide if such computer cross-checking should be allowed and, if so, how it might be regulated to assure an individual's privacy is not violated.

The Privacy Act was approved in 1974 before the government collected more than 3 billion files on its citizens and when cross-checking was laborious, and an impractical use of employee time. Now, with more than 200 kinds of records on file in government computers, cross-checking is a breeze.

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 Stirling Morita
Star-Bulletin Writer

Attorney General Corinne Watanabe says Sen. Neil Abercrombie didn't violate the state privacy code when he released salaries of top University of Hawaii officials to the news media.

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 its 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 is 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.

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 causes 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 records 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 to 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 now withheld 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 I 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 Isle law on disclosures

THU SEP 12 1985 ADIs

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 guarantees.

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.

TUE JUL 9 1985 AD

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. Edit

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

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 27 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
Star-Bulletin Managing Editor

WED APR 24 1985 SB H

Viewpoint

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 SB 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 Ian 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 issues," 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.

Rep. Dwight Yoshimura
Moving "with caution"

Responsible Company Unable to Use DOT Registration Files

By Stirling 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 that 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 hand.

"There's a break in communications," G.A. Morris, legislative lobbyist for R.L. Polk & Co., which is hired to make recalls, said. "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 so wires in the alternator harnesses could be replaced.

The company also sought the same information so the rear axles of 1978, 1979 and 1980 El Caminos, Cutlasses and Malibus could be checked.

"General Motors has further agreed to fix 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 47,315 vehicles in Hawaii were recalled in 1982, 48,136 in 1983 and 28,435 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 70 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 owners move, Morris said.

State Transportation Director Wayne Yamasaki 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 wouldn't 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 has been forwarded to the Transportation Department, Yamasaki said. But Morris said Polk has tried numerous times during that period 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 along as the privacy code continues to be vague and contains penalties for improper disclosure, government employee will be reluctant to release records with identifying information about individuals, Lilly said.

An advisory committee for the Illinois secretary of state office said in 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 Yamasaki 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, Yamasaki said.

"They could get the people with expensive cars and try to market certain kinds of products to you," Yamasaki 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, towing companies had to get lawmakers to change the law because they weren't able 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 Stirling Morita
Star-Bulletin Writer

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Hope for sunshine?

MON MAR 18 1985 AD F

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. edit

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

TUE MAR 12 1985 SB H

By Robbie Dingeman
Star-Bulletin Writer

The head of the citizens' group Common Cause/Hawaii said yesterday his 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

SAT MAR 9 1985 SB H

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 law 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 a 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 air field at Mokuleia.

—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 initiative.

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: edit.

"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*

WED MAR 6 1985 AD F

By Jerry Burris
Advertiser Politics Editor

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, news media 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 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 Ian 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 . . ."

One issue that drew disagreement even among supporters of greater "sunshine" is whether the law should be generally worded 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 changes 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.

State needs more prison space and more choices, Ariyoshi says

The state should seek ways other than putting criminals behind bars — but at the same time should build more prisons, Gov. George Ariyoshi said yesterday.

He said he expects to receive specific recommendations soon from a corrections task force chaired by Andrew Ing.

Ariyoshi said he is convinced there is a need to build more prisons, and thus is backing a $1.5-million request to add 250 beds at the Halawa medium-security facility. The House Corrections Committee recently sent out an appropriations measure for Halawa.

Ariyoshi said that although there is a need for more prisons, he wants to find ways of providing punishment short of putting criminals behind bars. For instance, he said, those not considered dangerous may be allowed to stay out of prison and do work in the community.

"If you were sentenced to do that for six months or one year, and every weekend you had to report to some work center, and you had to do some constructive work for the general public, that could become a pretty severe penalty," Ariyoshi said.

Groups Support Attempts to Free More Information

WED MAR 6 1985 SB M

By Stirling Morita
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 news media 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.

Ian 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 uncompleted 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

WED MAR 6 1985 SB H

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.

Ian 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

WED MAR 6 1985 SB H

Editorial

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

TUE MAR 5 1985 SB H

By Stirling Morita
Star-Bulletin Writer

The people who are supposed to notify Hawaii 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 recall 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 1980, he has battled government officials over release of salaries of university professors and records governing milk 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."

Ian 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.

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. Mary George to exempt county councils from the restrictions of the open meetings law.
- A measure 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 would restrict government attorneys' discretion in release of records withheld because of lawsuits.
- 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 the 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.

State Privacy Law Is Too Restrictive

SAT FEB 16 1985 SB H

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. Editorial

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

SAT FEB 16 1985 ADV

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. Edit.

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 day-care 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: "If 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 parimutuel wagering on greyhound races.
- ✔ Limit the liability of the state and county governments to $500,000 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
Advertiser Government Bureau

Hawaii's privacy law is casting a shadow over the state "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 called on the media council to join Common Cause in lobbying for changes to the privacy law when the Legislature convenes next month.

Legislators based the state's 1980 privacy law on a draft of a model law from the National Conference of Commissioners on Uniform State Laws. Hawaii's law does not carry a clause later included in the model law that says any records containing private information about citizens should be protected, but only if it clearly constitutes an "unwarranted invasion" of someone's privacy.

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's proposed amendments would bring the state law more in line with the model legislation.

One amendment would require officials to view the privacy act in the context of a broad policy of increasing the public's right to know how government works.

Only information that would clearly cause an unwarranted invasion of privacy would be covered by the act. And anything that might be private would be weighed against the right of the public to know about governmental activities, Lind said.

Another media council speaker expressed skepticism that the amendments to the law would significantly change official attitudes.

H. Baird Kidwell, former Hawaii Supreme Court justice, said he endorsed the Common Cause proposal "as 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 a clearly unwarranted invasion of privacy.

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.

Kidwell 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 or 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.

Ian Lind
Urges media council to lobby

New Look at Wiretap Law Set

MON APR 2 1984 SB H

Two Cases to Be Argued Before Hawaii Supreme Court

By Lee Catterall
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 Big Brother.

The justices will hear arguments in two significant cases April 19. The first involves tape recordings made by an undercover police officer in the office of a Honolulu foot doctor later charged with illegally dispensing drugs. The other focuses on video- and audiotapes made at a saimin shop by police of two men subsequently accused of bribing police.

In a 3-2 decision, the high court in 1982 upheld the law's provision allowing police — without a court order — to install wiretaps to record a conversation in which a participant, a police agent, consented to the taping.

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 about conversations with defendants, the argument goes, tape recordings merely provide jurors with accurate accounts.

"If you were an innocent person," said Deputy City Prosecutor Thomas Pico, "you'd want that tape" allowed in court.

Defense attorneys contend that conversations intended to be private should remain private.

Defense attorney Reinhard Mohr of the American Civil Liberties Union says his organization opposes any kind of tape recording by police of private conversations.

TWO CASES involving wiretaps are scheduled for argument before the Supreme Court as the Hawaii Legislature is considering extending the life of the six-year-old law, which otherwise will expire in June.

Senate Judiciary Chairman Anthony Chang has said that he expects his committee to endorse a House-passed bill that would make the wiretap law permanent.

Under the law, police are allowed to obtain court orders allowing the wiretapping of conversations among people who are unaware of the bugging.

Of more immediate controversy is a provision allowing "installation" of wiretaps — or bugging a place to record a conversation — without a court order if the conversation was not in a "private place" and a participant in the conversation knew it was being taped.

In December, the Supreme Court unanimously upheld a judge's decision to disallow tapes of a Honolulu psychiatrist facing drug charges because they were recorded in the bugged hotel room of a patient. The hotel room was a "private place," the court ruled, so the tape was not allowed as evidence.

The high court did not address the issue of whether psychiatrist Pershing S. Lo's constitutional right to privacy was violated.

DEPUTY CITY Prosecutor Pico said his office has "no problem" with the Lo decision as long as police are allowed to tape conversations in places deemed "private" by planting taping devices on police agents instead of "installing" them in the room.

That issue is expected to arise April 19, when the Supreme Court will hear an appeal in the case of Dr. Michael Lee, a foot doctor charged with illegally promoting sedatives and tranquilizers in 1979 and 1980.

Circuit Judge Philip Chun ruled in 1982 that tapes of conversations made in the case could not be used because an undercover police officer, equipped with

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Continued from Page One

recording devices, recorded them in Lee's office, a "private place."

The constitutional issue of privacy rights is likely to be addressed more directly the same day in a case involving Board of Water Supply pipefitter George Yamamoto and city Fire Captain Roy Okubo, who are charged with bribing police.

Police had made 13 videotapes and 40 audiotapes of the two men during a seven-month period beginning in December 1979. Yamamoto and Okubo are accused of giving $3,250 in cash and four aloha shirts to two police officers in return for being alerted about prostitution raids of Superior Bath Systems in Waikiki.

THE TAPES were recorded in the now-defunct Beretania Saimin restaurant and other places with public access, but Judge Simeon Acoba in June 1981 disallowed them as evidence because Yamamoto and Okubo thought the conversations were private.

"The nature of the transaction and subject matter of the purported conversation at Beretania Saimin reasonably indicates it was expected and intended to be confidential," Acoba said in a written opinion. "The fact that it occurred in a public place did not change its private nature."

The Intermediate Court of Appeals overturned Acoba's decision in October 1982, asserting that the target of a tape recording has no basis for thinking "that the person spoken to will not disclose what was said."

The tape recording "merely preserves the best and most reliable evidence" of the conversation and "thus serves to enhance the truth-finding function of the court," Chief Judge James Burns wrote.

In written arguments to the Supreme Court in the Lee case, defense attorney David D. Cheal said that comparing taped conversations with non-taped conversations is like comparing apples and oranges.

"IT DEFIES all common human experience," Cheal wrote, "to say that one would speak in the same, unguarded manner in those situations as if there was a high likelihood that the conversation was being taped, much less broadcast."

Continuing to allow police or their agents to secretly tape record people has "very serious societal" consequences, he added.

"What is to prevent the unbridled use of participant monitoring in the academic community," Cheal asked, "particularly if and when we have another McCarthy atmosphere?"

Deputy Prosecutor Pico says such abuse of wiretaps by police is "highly unlikely."

Not only do police have little if any interest in such activities, Pico said, "Our police department doesn't have that many guys to go around and do those things."

Pico agreed with Cheal that people "would probably choose their words much more carefully" if they knew they were being recorded.

However, he said, courts have ruled that "you have to allow the state to act in a deceptive manner" in gaining evidence against criminal suspects. He said undercover officers do so frequently when taking part in drug purchases so they can gain evidence against suspected sellers.

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.

Editorial

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 responsibly 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.

Child-Care Complaint Airing OKd by House

TUE APR 3 1984 SB H

Privacy

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 Albano cautioned the news media and others to responsibly 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."

With only Rep. Whitney Anderson dissenting, the House approved the bill 47-1.

Albano 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 send 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 balloting procedures and cracking down on police impersonators were approved by the state House yesterday.

In agreeing to Senate changes to House 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 Nukolii resort backers waged a widespread absentee ballot campaign in a special election reinstating resort zoning for the Hanamaulu, Kauai, site.

There were complaints about the abuse of the use of absentee ballots.

The law currently allows a registered voter to get 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.

In Hawaii...

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The voter doesn't have to specify his reason for voting absentee, but has to say that his situation 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 a $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 Tom, 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 debated in the House and approved with only five dissenting votes.

Noting that he doesn't condone welfare fraud, Rep. David Hagino said the language of the bill is "overly broad" and could restrict the rights of poor people.

House Minority Leader Fred Rohlfing said he finds it "ironic" that the state doesn't disclose its information to the public, but enacts laws that require financial institutions "to go into the records of our citizens."

THU APR 12 1984 SB H

Rep. Marshall Ige 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," Ige said.

OTHER BILLS approved by the House and sent to the governor would:

—Grant immunity from civil liability to members of state boards and commissions.

—Set up procedures and responsibilities for self-service storage facilities.

—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 peer review 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 (police officer'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.

Welcome Fawcett
"You will see some movement"

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 Catterall
Star-Bulletin Writer

A restructured 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 face-to-face and telephone conversations could be used as evidence in the bribery trial of Board of Water Supply pipefitter George Y. Yamamoto, 39, and city Fire Captain Roy T. Okubo, 39.

Yamamoto and Okubo are accused of giving $3,250 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 Padgett 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 Padgett and Justice Yoshimi Hayashi. Justices Edward H. Nakamura and James H. Wakatsuki dissented.

The ruling affirms a decision by the Intermediate Court of Appeals, which had overturned Circuit Judge Simeon Acoba'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 Ogata 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.

Deputy City Prosecutor Thomas Pico 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, Pico said, "Until this case, we hadn'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 Memminger
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 their 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 hearings should remain closed to the public and that the records of the meetings should remained sealed. Even if he felt differently, it would not matter, because parole board procedures are mandated by law.

But others believe the system should be opened up. The chief proponent of that has been the city prosecutor's office.

City Prosecutor Charles Marsland said changes in laws governing the parole authority have been proposed in a package of bills designed to aid victims of crimes.

"IT IS THE same old garbage," Marsland said of the way the paroling authority is structured. "Everything is to the benefit of the defendant."

The prosecutor's office would like victims of crimes to be allowed to attend parole meetings when minimum prison terms are set. Marsland also would like a deputy prosecutor to be there to give information about the case that might not have come out in court.

Marsland is angry that many victims are not told when defendants are being released.

But Hugo is among those who believe that the prisoner's rights to privacy should be a consideration in the parole process. He points out that victims who request to be notified of a pending parole are told through the victim/Witness Kokua program.

Hugo, who has been on the parole board for almost eight years, realizes that he is in a tough position. Every decision of the parole board bothers somebody, he said.

That dilemma was apparent in the recent parole of organized crime figure Alvin Kaohu. The board was attacked by some for paroling Kaohu a year before 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 authority 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 paroling authority. From there, the inmate begins a step by step process where he is given more responsibilities 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 wait until they are called before the board when they have served their minimum sentence.

The parole board, made up of Hugo and part-time members Marc Oley and Kayo Chung, holds weeklong 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

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Thomas Hugo
"I go by the record"

States Differ in Handling of Paroles

By Charles Memminger
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 to handle the problem.

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 other than writing letters to the Hawaii Paroling Authority, 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. Transcripts of the meetings, as well as all correspondence in connection with cases, are sealed.

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 had heard rumors that Kaohu was being considered for parole but because Kaohu had a year left on his minimum term, he didn't think much about it. He acknowledges that even if he had known, he couldn't have done anything about it.

"I could have written a letter that they would have ignored," he said.

IN CALIFORNIA, the parole board takes no action on the "vast majority" of prison cases, according to Phil Guthrie, a public information official with the California Department of Corrections.

Minimum sentences in all but murder cases are set by the courts, Guthrie said.

The parole board does hold hearings on the release of inmates serving life terms for second- and third-degree murder.

Those hearings were closed until 1979, he said.

Now they are open to the public and all of the records associat-

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Prison Parole Systems Are Varied

Continued from Page One

ed with the cases are open.

Guthrie said that there was some apprehension about opening the meetings, mainly because of the trouble of notifying everyone 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 (releases) were denied. The public had the impression that the parole board was letting everyone out."

In Oregon, the hearings are generally closed to outsiders, except with an unusual twist. The inmate can bring a person of his choice into the hearing room. If he or she wants, it can be a news reporter, according to Hazel Hays, chairman of the state's parole board. An enterprising reporter could stand outside the hearing room and ask each unaccompanied 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 a particular time, she said. The only records sealed are letters that might lead to harm to the persons who submitted them, Hays said.

In Washington state, parole and disciplinary hearings are closed to the public and records are sealed, according to Thomas Pappas, executive secretary of the Washington State Board of Prison Terms and Paroles. A monthly board meeting on the board's policies is open, he said.

Washington also does not disclose which inmates are being considered for parole and records of the parole hearings are sealed. Letters sent to the board are "summarized" for the press, but identities of the letter-writers are not revealed, Pappas said.

Washington is one state, however, that recently decided to abolish its parole board. In 1988, the board will no longer exist and all sentences will be set by the courts.

Hawaii's parole board chairman Hugo says there are about seven other states that have done the same thing that Washington has.

Hugo said any change in the way the parole board works in Hawaii will have to come through the state Legislature, but he's happy with it the way it is now.

And he warns that the trend abolishing parole boards in favor of mandatory minimum sentences could have costly repercussions.

"If we move in that direction, we'd better be ready to build more prisons," Hugo said. "Because we'll need them."

Parole Board Chief Defends State System

Continued from Page One

which prisoners are being considered for parole, Hugo said. Letters sent to the board in support or against the release of inmates are considered by the board, but are not made public, he said.

THE MEETINGS are recorded by a court reporter, but the transcripts of the meetings are not made public, Hugo said.

Inmates, usually accompanied by their attorneys, are questioned by board members for about 15 minutes, Hugo said. One reason the hearings are closed to the public, Hugo said, is that prisoners feel 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 inmates being considered for release.

The hearings usually are "low key," Hugo said, with the inmates expressing why they think they are ready to be released. Hugo said he usually puts more emphasis on prison records of an inmate's progress instead on what the inmates say.

"I go by the record," he said. "I don't go by gut feelings."

Some families and friends of inmates also sometimes attempt to put pressure on board members to free an inmate. Hugo said he gets calls from people supporting an inmate's release, but he tells them to put their comments in writing. He also has gotten "many, many threats" from anonymous people in connection with his job. But he accepts such threats as a hazard that goes with his $42,000-a-year job.

DESPITE some accusations that the parole board is something like a swinging door that allows prisoners to go free, statistically, the board turns down about as many requests as it grants.

Last year, the board considered 184 applications for parole, but granted only 79, according to the authority's annual report.

But the statistic of which the authority is most proud is that only about 3 percent of those paroled in Hawaii eventually have their parole revoked.

Once on parole, an inmate is assigned one of seven case officers with whom they have to check in with at various times. When first released, the inmate may meet with the parole officer once a week. But as the end of his parole term nears, the meetings may become less frequent, Hugo said.

Hugo realizes that there are people who would like to see the parole authority's procedures revised, especially to allow more "sunshine" into its activities. In fact, some states have abolished parole boards as courts begin to impose both maximum and minimum sentences, leaving nothing for parole boards to decide.

But he thinks the board does a good job the way it is now.

"We are just trying to do what is best for the community and the person (inmate) involved," said Hugo.

Newsmen Urge Change in Police-Media Relations

WED JUN 20 1984 SB H

By Rod Thompson
and Stirling Morita
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 58-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 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 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 Isle 'privacy act' needs to have major rewrite

FRI DEC 7 1984 AD P

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 day 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. Editorial

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

WED NOV 28 1984 SB H

By Maud S. Beelman

MIAMI (AP) — Newspapers must be wary about violating people's privacy and shed the institutional defensiveness with which they greet criticism, according to speakers at the Associated Press Managing Editors convention.

"Newspaper people are nearly hopeless when it comes to dealing with direct criticism from the public, and that characteristic must change," Richard Cunningham, a former reporter and ombudsman now teaching at New York University, said yesterday at the group's 50th annual meeting.

What also must change is "both our personal defensiveness and that institutional defensiveness that wraps itself in the First Amendment and says the way we run our newspaper is nobody's business but our own," said Cunningham.

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 professions, 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.

SAT NOV 24 1984 SB H

Group Says Privacy Law Misused

By Stirling Morita
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 this, 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 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 fleshing 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 that 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 dovetail 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 legisla-

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Group Says Privacy Law Is Misused

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Continued from Page One

tive 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 that 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

HIGH COURT LISTENS—Members of the Hawaii Supreme Court and substitute justices hear arguments today in a libel suit case. They are, from left, Justice Frank Padgett, Justice Edward Nakamura, Intermediate Court of Appeals Judge Harry Tanaka and Circuit Judge Simeon Acoba. —Star-Bulletin Photo by Craig T. Kojima.

By Lee Catterall
Star-Bulletin Writer

Honolulu police and the Hawaii Crime Commission today urged the state Supreme Court to block an attempt to obtain information about confidential documents to be used 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 "dragnet subpoena" of Honolulu Police Department and Crime Commission records.

Three of the five justices — Chief Justice Herman Lum and Justices Yoshimi 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 1982, 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. Kina'u Kamaii-'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

WED SEP 5 1984 SB M

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. Wil 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 policy, it is very wrongheaded for the government to be engaged in this sort of information swapping," said Barry Lynn, legislative counsel for the ACLU.

"It's nightmarish for a person to find out that even the simple act of putting his name and address down years later may serve as evidence in some criminal prosecution," Lynn told the Associated Press.

In addition to screening drivers' names, the Selective Service searches for non-registrants using a list of the 1.3 million to 1.6 million young men who start their senior year of high school each fall, according to Ebel.

The Defense Department buys that list for $250,000 from Gray Advertising Inc. of New York and uses it to send recruitment brochures, according to Maj. Peter Wyro, a Pentagon spokesman.

"The way I look at a public awareness program of this nature is that we are performing a service because we are trying to make sure every young man knows that he must register," Ebel said. "Otherwise he might lose out on a federal student grant or a place in a job-training program or he might not know he was committing a felony."

Then-President Jimmy Carter ordered the resumption of draft registration in 1980 following the Soviet invasion of Afghanistan. But there is no military draft and it would take an act of Congress to get one started.

Ebel said 97 percent of all 18-year-old men register voluntarily. He said the names of 130,000 apparent non-registrants have been turned over to the Justice Department for possible prosecution.

So far, only 16 have been indicted, but many non-registrants comply with the law after a visit from the FBI, according to Justice Department spokesman John Russell.

Supreme Court backs police in 'bugging' case

By Ken Kobayashi
Advertiser Staff Writer

In another in a series of split decisions by the Hawaii Supreme Court on police recording suspects' conversations, the high court has ruled 3-2 for the prosecution in a drug case against Honolulu podiatrist 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 majority said one difference 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 1984 SB H

By Gregg K. Kakesako
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 Kaahumanu 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 city Department of Housing and Community Development, Ian Lind, Common Cause executive director, argued that the proposals are public records under the state's sunshine law.

In a May 23 letter, Conant told Lind that the proposals were not available because negotiations still were continuing with the developers, who had not authorized the release of their material. (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 reaffirms 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 Kaahumanu project will extend to other issues.

No privacy rights in a prison cell, high court

Knight-Ridder Service

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 also have no constitutional right to embrace their wives, children and other family members.

The 5-4 search ruling so upset Justice John Paul Stevens that he read aloud excerpts from his stinging dissent, saying with noticeable emotion that the case involved "the difference between slavery 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 and malicious perusal, seizure or 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 "legal materials, letters and other personal property" after a "shakedown" of his cell locker.

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."

While conceding the risk of "maliciously motivated searches" and "intentional harassment" by hostile guards, the chief justi... focused on the frequency and constant threat of prison murders, riots and other inmate violence.

"The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit 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 time. 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-

rules

Inmates' Privacy Claim

Supreme Court Says Prisoners Cannot Challenge Searches and Seizures

TUE JUL 3 1984 SB H

By Richard Carelli

WASHINGTON (AP) — Prison inmates have absolutely no right of privacy and therefore 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 5-3 that private citizens lack the legal standing to sue the federal government into denying or rescinding 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.

✔ Decided 5-4, in a ruling against Time Inc., that the government may strictly regulate photographs and art work depicting U.S. currency. Time, which had used replicas of 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

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Denied

Seizures

No Privacy for Inmate, Court Says

Continued from Page One

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. Blackmun.

CONVICTED bank robber Russell T. Palmer Jr., an inmate at the Bland Correctional Center in Bland, Va., sued prison guard Ted Hudson, charging that in a 1982 "harassment" search he destroyed Palmer's personal property.

The suit stemmed from a shakedown search conducted by Hudson.

Today's decision, reversing a ruling by the 4th U.S. Circuit Court of Appeals, killed Palmer's lawsuit.

The second decision, involving pretrial jail inmates, came to the court from Los Angeles.

The 9th U.S. Circuit Court of Appeals ruled last year that people jailed for longer than 30 days before their trials are entitled to contact visits so long as they show no sign of seeking smuggled-in drugs or weapons or of trying to escape.

The Los Angeles County Jail has allowed inmates to have unmonitored visits, but they are separated from their visitors by glass and must speak by telephone.

A federal trial judge and the 9th Circuit court said the jail's absolute ban on contact visits represented an overreaction to security risks.

BUT TODAY the Supreme Court, again led by Chief Justice Burger, said "The Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility."

Burger noted that the court did not want to minimize "the importance of vists from family or friends" nor suggest that contact visits might not be helpful.

Burger's opinion also approved of cell searches without inmates present again for reasons of security.

He was joined by the five justices who signed his opinion in the Virginia case, along with Justice Blackmun.

Justices Stevens, Brennan and Marshall dissented in the California case.

Various critics contend that lack of physical contact — hugging, kissing and holding — can have harmful effects on marital and parent-child relationships while one spouse is incarcerated

Child Care Records Law Brings Results

Public

The new law opening state records on preschools and babysitters to the public is apparently doing what it was intended to do.

Editorial

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.

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 filled 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 on the conduct of police officers.

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. Editorial

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.

Those 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. Records

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.

SUN APR 29 1984 AD

Bill on investigative panels goes to legislative conference

By Sandra S. Oshiro
Advertiser 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.

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 Stanley 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 assure 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

Editor's note: The writer testified at a House hearing last week in favor of legislation that would facilitate inspection of state records concerning the several hundred preschools and licensed day-care centers in Hawaii.

At the same time, he pointed out that denying The Advertiser and other media and the public access to such records is symptomatic of a much larger problem.

By George Chaplin
Editor in Chief, The Honolulu Advertiser

The Founding Fathers 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 seek to serve "the governed, not the governors."

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 bottle up information for any of several reasons.

One is that such information will prove embarrassing, reflecting anything from sloppiness to highly indiscreet behavior all the way to active misdeeds.

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 remedial action.

For some in government, life is simply easier if the files are closed to 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 1975 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 formation and conduct of public policy.

"Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.

"THEREFORE, THE legislature declares that it is the policy of this state that the formation and conduct of public policy — the discussions, deliberations, decisions, and action of governmental agencies — shall be conducted as openly as possible.

"To implement this policy the legislature declares that:

1) It is the intent of this part to protect the people's right to know;

2) The provisions requiring open meetings shall be liberally construed; and

3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings."

That covers intent 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.

The result was a hybrid piece of legislation, Chapter 92-E, 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 92-50," which deals with access to public records.

The result is that this more recent law emasculates much of 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 Jeffrey Portnoy, a First Amendment specialist, said recently regarding treatment of files under the privacy statute:

"It makes no difference whether [an] individual is an elected official, a civil servant paid out of public funds, or a bureaucrat — (the statute) has been used to deny access to university salary information; information concerning deputy sheriffs; employment background of persons in line for important state positions; complaints registered and filed against licensed preschools; access to official reports about conditions in our prisons; and the list goes on and on. It has, quite frankly, grown into a monster . . . "

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, especially in the Attorney General's office, appears to be that everything is closed until and unless it's forced open, either by court order or by the kind of public pressure evident in the outrage over the recent preschool tragedy. That's exactly the opposite of what the policy should be.

ON MARCH 7 The Advertiser asked Deputy Attorney General Thomas Farrell about public access to the state's files on preschools. At the time he said it would be a violation of the state privacy law. The Star-Bulletin asked for the same information and 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 an article of faith in the AG's office.

THAT'S BEEN evident in such cases as the following, from a list cited by Portnoy:

- "This state administration attempted to seal sewer records kept by the State Department of Health until a circuit court judge ordered them released in an opinion which blasted the . . . attempts 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 a television station threatened litigation.
- "This administration (or at least one deputy AG) tried to close hearings on the importation of Mainland 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 — and the list goes on and on . . .

And, of course, the legislature is not without its own sins.

THE CURRENT interest in enabling access to State records on preschools and licensed day-care centers is commendable. But all in the administration and all in the legislature should also take a broader view and strike a blow for general openness.

Secrecy is a hallmark of the closed society. It is alien to the open society ideal. Openness and [illegible] are the best ways to [illegible] liberty.

April 1, 1984

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 Oahu 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.

Editorial

EFFORTS BY the state Administration and Legislature to open up such files to the public in some 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 larger situation, the Legislature should both act to provide the preschool and day-care information needed now and consider what else might be done to more completely revise the flawed privacy law enacted four years ago.

Time is getting short this session. Yet it seems possible for the Legislature to name an interim committee or perhaps an advisory group of representatives of various public and private interests to review the privacy law with an eye to larger changes next session.

The unfortunate alternative may be more records kept secret and more court battles as the media and public interest groups fight to open what should have been public in the first place.

Privacy Law Becomes a Pressing Problem

WED MAR 2 8 1984 SB M

By Stirling Morita
Star-Bulletin Writer

Taxpayers today can't 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, nor can the public learn who have benefitted from the state-backed Hula Mae mortgage program or the names of applicants for such top government jobs as University of Hawaii's Manoa campus chancellor, state school superintendent and state librarian.

The list goes on and on.

These are the government records hidden from public view since the creation in 1980 of a state privacy law.

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 One

Sets Up Conflicts

Continued from Page One

or the fact that government isn't doing its job.

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 identifying particular assigned 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 calls for withholding of records involving "highly personal and intimate affairs." In dealing with cases involving privacy, the courts have concentrated on government intrusion into personal matters, such as abortion and contraception, and matters of personal choice, such as hairstyles.

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 people who request government records that they are closed under the privacy law, Lind said.

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 backer 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 or 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. They have offered to show the newspaper 10 of the reports which have been "sanitized" by deleting information about individuals named in the reports.

THIS COMES in the wake of an abduction and rape case at a preschool on Windward Oahu.

Lind said that whether government is doing its job in monitoring the activities of preschools and day-care centers is a legitimate public interest.

The ACLU's Hills said, "We feel the government is misguided not to release information about a preschool."

Businesses, such as day-care centers, don't have the right to privacy that an individual person has, she said.

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 open.

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

By DOUGLAS WOO
and GERALD KATO
Advertiser Government 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 Bill 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, Big Island 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 denied 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 Kauai-Niihau delegate Yoshio Kojima. 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.

Councilman George Akahane said that with such a charter amendment some journalists might consider "fabricating" stories.

"I feel there is not enough checks and balance," Akahane said during a council committee meeting.

Councilman Daniel Clement then injected the issue of disclosure into the discussion. Noting 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.

Akahane 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, Akahane 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 expend 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 Countiss, 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.

Countiss said there still are "significant safeguards" against unwarranted invasion of privacy in the wiretap bill suggested by the commission.

Kekoa D. Kaapu

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."

Managing Director 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 auditoriums 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 3-4, 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

U NOV 17 1977 SB M

Will Organize

Privacy

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 photostating 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 Marv Adamski
Star-Bulletin Writer

There is no such thing as a "right to privacy" spelled out in the Constitution as are 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

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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 "invade 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.

"What we are more interested in is not usually the information that would violate an individual's privacy," said Peter Rosegg, an Advertiser reporter.

Press vs. privacy:

SUN FEB 27 1977 AD F

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 a 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 rights to privacy.

The panelists were Jon Van Dyke, a visiting law professor at the University of Hawaii Law School; Mike Middlesworth, managing editor of The Honolulu Advertiser; Robert Kimura, former State legislator; and Stewart Chiefet, 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 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 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.

Chiefet, 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."

Chiefet 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 Chiefet, 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.

Middlesworth 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, Middlesworth 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.

Middlesworth 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 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

TUE MAY 31 1977 AD A

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 abuses.

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 services 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 129,100,000 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. Editorial

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 bedevil 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 Students

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 held a briefing for reporters to explain how the 1975 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 academic information 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 degrees 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.

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 UH cannot say that a specific athlete is ineligible because that would intrude on his or her privacy, under the federal law. Only if a release waiver is filed can that information be disclosed, she said.

An athlete may refuse to allow disclosure about an injury because it may hinder his chances for a professional career, noted sports information director Eddie Inouye.

The law applies to all institutions of higher education which receive federal aid.

Grades Too Secret Under Privacy Law

By Jonas Gereben
Star-Bulletin Writer

A federal law protecting the privacy of college students is causing a lot of headache 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 receives on papers, examinations and at the end of a term — without anybody else finding it out?

No longer can grades be announced, posted 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 parents, the address of the student, the student's Social Security number or student number, or any characteristic information which makes it possible to identify the student."

Under these 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 any longer if they go with "personal identifiers." That just about finishes 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, create 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 600 students in his class.

WHILE handling grades for examinations through teaching assistants who hand the paper to individual students, Locke said final grades are usually posted by Social Security number. "We don't see them after finals and there is no other way to handle it," he said.

Told that posting grades is no longer allowed, Locke said that he will follow the rules, but he 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 professors or the teaching assistants."

With nearly 700 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.

Kokua Line

By Joanne Imig

Q — How much authority does the Department of Social Services have to investigate on 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 SANDRA S. 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 F. 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 Dick 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 hui.

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 $5,110 which were made out to Wong with handwritten notes that read "AAH shs 1,000" and "1,400 AAH shs" or "1,400 AAL shs." 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 to Wong from the hui'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 23 1975 which Yee said represented a partial payment for the purchase of island property in Washington State. Another check for $8,010 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 $3,375 dated Nov. 1, 1974 was in payment for a thousand shares in Aloha Airlines which Yee sold 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 $3,500 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.

Char also wrote a check to the "Friends of Fred Rohlfing" in 1974 amounting to $50. Rohlfing said yesterday that it appeared that the donation was made in payment toward reducing a $40,000 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 size and weight of high school athletic teams and the names of members of the marching band. A United States Attorney declared the Privacy Act of 1974 prohibited him 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 tempting 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.'"

Richard Schmidt
"Privacy must yield"

News execs debate privacy of

By HUGH CLARK
Advertiser Big Island Bureau

KAWAIHAE, Hawaii — Newspaper executives from four western states debated the public's right to know vs. individual privacy here 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.

After several publishers had called for greater restraint and better judgment, a Honolulu attorney asked if self-censorship might not 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 the privacy question begins drew diverse comments from the delegates to the annual conference of the Associated Press Association of California, Arizona, Hawaii and Nevada.

Hawaii'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 Luter, 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 Ridder, publisher of the Long Beach Independent, interjected that newspapers "are losing the public relations battle by going too far . . . (we) should use more restraint and better judgment."

But Honolulu attorney David Dezzani asked if 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, president of the Frank E. Gannett Newspaper Foundation, asked if the decision by Walsh did not amount to a "double standard."

Walsh replied no, because a newspaper is 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 Harris poll that showed a decided decline in confidence for all American institutions since 1966.

While newspapers suffered an 11 per cent decline, others plummeted by comparison.

He said no matter how newsmen see themselves, too many critics view the newspapers as too powerful as spokesmen for the establishment or as the enemy of the establishment.

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individuals

He said part of this is because of the rapid speed 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 good 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 68 per cent compared with 10 per cent for television.

UH Professor Sues U.S. Over CIA Acts

TUE SEP 28 1976 SB A

Privacy

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

By Gregg K. Kakesako
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, if necessary, come up with suggestions for next year's Legislature."

Amemiya was referring to the U.S. Freedom of Information Act, which became law July 4, 1967, and the federal Privacy Act, enacted Sept. 27, 1975.

AMEMIYA IN a speech Wednesday to the Hawaii Joint 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 privacy."

Amemiya said, "The relative merits of the public's rights to be informed versus the individual's right to privacy must be weighed in deciding whether to grant a request for information."

"Recent experience has shown that the tendency is to grant the request for information in most cases," he said.

UNDER THE Freedom of Information Act, federal agencies are prohibited from releasing:

—National defense or foreign policy secrets.

—Classified materials.

—Certain investigatory files compiled by law enforcement officials.

—Internal agency rules, memorandums, letters and practices not affecting the public, trade secrets, financial information which are privileged or confidential, personnel or medical files and similar information which would "clearly" constitute an unwarranted invasion of privacy."

"THESE exemptions do not prohibit the dissemination of all information. However, if only part of the information which is requested is exempted, the remainder must be provided if the exempt agency information can be reasonably segregated from the rest of the information sought," Amemiya said.

He noted that the privacy act grew out of dissatisfaction with the results of the freedom of information law.

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 erroneous 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-2365) sponsored by Rep. Faith Evans, R-24th Dist. (Kaneohe-Maunawili).

WED FEB 25 1976 SR H

"The bill would safeguard the public's right to know by deletion of 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.

FRI NOV 14 1975 SB H

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?

(Editor)

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

Sen. Joseph Montoya, conducting a probe of Interpol, the international police intelligence network, fears Americans' rights could be violated by careless use of information.

In novels 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, whose headquarters is 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 120 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 American citizens.

Like most police organizations, Interpol has been reluctant to discuss its work in public. But this year a subcommittee of the Senate Appropriations Committee has 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 M. Montoya (D., N. Mex.), says 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 Montoya's concern is Rep. Edward P. Beard (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 rightist and leftist dictatorships, 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 had virtually no prior law enforcement experience and who was placed in that sensitive post through a reference from Charles G. (Bebe) Rebozo, 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 six years' experience in selling cars and yachts in Virginia and Florida. Bryant's career with the federal government began with a $1-a-year job at the White House, as an assistant to Ronald L. Ziegler, then Nixon's press secretary.

After only nine months in that post, Bryant landed a $19,000-a-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-related studies while at Interior, people in the department remember him principally as a Rebozo protégé.

Using references from Ziegler and Rebozo, 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. Sims, 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 International 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 virtually 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, Romania 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.

Louis Sims, head of Interpol office in U.S., insists political data on Americans are not sent to Communist nations.

About two-thirds of the headquarters employees are clerical workers who maintain an elaborate set of criminal files, including a name 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 Montoya that he checked "very closely" when he received an Interpol-relayed 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, disagrees. "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."

SUN NOV 9 continued

Interpol's French HQ: More than a million cards, plus dossiers and fingerprints, allow Interpol to keep tabs on the world's most notorious crooks.

PRIVACY *CONTINUED*

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 contraband 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 a different 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 TECS 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 the 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, in 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 undermines, threatens or ignores the rights of that society's citizens."

Privacy & press

MON SEP 29 1975 AD H

ON THE MEDIA

charles b. seib

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 precept stated more than 20 years ago 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 Saturday. It curbs governmental invasions of privacy by restricting the collection and use of official files on individuals and by giving citizens the right to inspect and correct the files the government keeps on them.

THE GROWING CONCERN for individual privacy is also being felt in the news business. There the issue is, 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 pals in public life, too reluctant to expose the boozers 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 misbehavior. Should the press report that breach of the prevailing mores? Most news people would say no under a rule of thumb 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 striking back 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—is 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 disclosed them partially.

In the case of the citizen who wounded the robber, the name was not published. And most newspapers withhold the names of rape victims.

Editors are faced with questions like those 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 1890, 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, attendant 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 858 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 freedom 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 "three technological developments . . . altered the balance between personal expression and third-party surveillance that 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."

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 will go part of the 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."

UPI Photo

Stanford demonstrators protest Ford policies during President's speech.

the nation

Ford vows to protect people's right to privacy

MON SEP 22 1975 AD H

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, spied 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 posession 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 MON APR 14 1975 SB H

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 Vietnam resulted in numerous infractions of civil liberties that culminated 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 invaded whenever what the person does interferes with his public life."

This Lisagor-expressed standard of when to publish and when not to publish is a 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 cozy 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."

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 limelight 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 (through the election process) those politicians whose private acts are impairing their ability to do the job they were elected to do.

APPENDIX M

MISCELLANEOUS RESOURCES

COMMON CAUSE/HAWAII

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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*[1] 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 on 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.[2]

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

[1] *National League of Cities v. Usery* 426 U.S. 833 (1976).

[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 effect 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 thus 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 there 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, monies 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.[1] 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-

[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 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.

whether a particular type of record-keeping system should exist at all; another is whether particular transfers of records among agencies are desirable. Such questions require independent policy judgments and thus must be addressed by an entity other than the one directly involved. In Chapter 1, the Commission enumerates the functions it believes such an entity should fulfill.

Finally, it is worth noting at the outset that the concerns expressed by the various agencies at the time of the Act's passage regarding anticipated costs of implementation, numbers of access requests, and burden of administration have generally proved to be unwarranted. For example, the expected controversy over patient access to medical records has not developed. Cost figures recently released by the Office of Management and Budget (OMB) show expenditures to be much lower than originally estimated. In 1974, OMB had estimated that implementing the Act would cost $200-$300 million per year over the first four to five years and require an additional one time start-up cost of $100 million, which would be expended in the first two years. In 1977, however, OMB estimated that start-up costs in the nine months between the Act's passage and the date it took effect were $29,459,000, and that an additional $36,599,000 was spent for first-year operating expenses.[3]

The Privacy Act Principles

The *requirements* of an act, although not always easy to interpret, derive from the words of legislation. *Principles*, on the other hand, are sometimes less readily apparent. The statement of principles in a law's preamble, the law's legislative history, and the conditions or problems that led to its passage must all be read along with the language of its specific provisions.

Although many issues in the 1960's and early 1970's were loosely grouped under the category of invasions of privacy, it is clear that many of the perceived problems had very little in common. Some of the actual or potential invasions of privacy involved physical surveillance or wiretapping; some involved mail openings or burglaries conducted by government agencies; others centered on harassment of individuals for political purposes; and still others concerned the unfair use of records about individuals.

The inquiry into these matters by a number of congressional committees did not share a common analytical framework, nor were the distinctions among different types of privacy invasions sharply drawn. Nonetheless, they succeeded in focusing public attention on privacy issues and in amassing useful information regarding particular aspects of the privacy protection problem.

In 1972, the Secretary's Advisory Committee on Automated Personal Data Systems was appointed by the then Secretary of Health, Education,

[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.

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.[4]

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:[5]

(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

[4] DHEW Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens*, (Washington: U.S. Government Printing Office, 1973), p. 41.

[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 record keeping, 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"[6] 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. 552a(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,

[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. 552a(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,[7] 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").[8] 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 ought to be 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 to 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*

[7] Two examples will illustrate the extremes of agency implementation of the "system of records" provision. A small component of one agency rearranged its personnel records by Civil Service grade, instead of individual identifier, in order to avoid the Act's requirements. The Department of the Navy, on the other hand, elected to bring a file of interview records under the Act even though they were filed (and hence retrieved) by the date of the interview.

[8] An "attribute search," contrary to the more common "name search," or "index search," starts with a collection of data about many individuals and seeks to identify those particular individuals in the system who meet the prescribed conditions or who have the prescribed attributes.

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 officers 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 activators, 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 current 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"[9] 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

[9] The "Privacy Act Statement" contains the authority for the solicitation of the information, the principal purposes for which it will be used, its "routine uses," and the effect on the individual of not providing the information. *[5 U.S.C. 552a(e)(3)]*

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

likely to read it; if it is too short, it may not convey enough information for the individual to understand fully how the information will be used. The contents of the Privacy Act Statement are discussed in the section on the Collection Limitation Principle.

The Individual Access Principle

The Privacy Act's second principle is that an individual should have a right to see and obtain a copy of a record an agency maintains about him. Prior to the Act's passage, an individual was able to obtain copies of the records a Federal agency might keep about him in several ways. The Armed Services, for example, made many personnel, medical, and performance records available to servicemen. In fact, the subjects of certain personnel records are required to review and sign them once each year. Federal agencies also have procedures that give an individual access to records about him when there is a dispute over his entitlement to benefits.

In addition, the Freedom of Information Act (FOIA) *[5 U.S.C. 552]*, which predates the Privacy Act by seven years, allows any person to see and obtain a copy of any record in the possession of the Federal government without regard to his need for or interest in it. An agency can withhold a record that falls within one of nine FOIA exemptions, but its determination to do so, if appealed by the requestor, must withstand administrative and judicial review.

Individuals could and did use the Freedom of Information Act to gain access to their own files prior to passage of the Privacy Act. There were several drawbacks, however. First, an agency could decline to release information deemed to be part of the internal deliberative processes of government.[10] In certain cases, this resulted in a considerable amount of information about an individual being taken out of a file prior to giving the file to him. Second, in the early days of the Freedom of Information Act, some agencies refused to disclose personnel and medical files to an individual on the grounds that disclosure to the individual would constitute a clearly unwarranted invasion of *his* personal privacy.[11]

The individual access provision of the Privacy Act *[5 U.S.C. 552a(d)]* was enacted in part to clarify these uncertainties with respect to an individual's right to see and obtain a copy of a record about himself. The Privacy Act has its own set of exemptions from its individual access requirement which will be discussed below. For all other systems subject to the Act, however, agencies must now facilitate access by an individual when he so requests and may never keep records about himself from him on the grounds that they constitute communications within or among agencies. Nonetheless, the Commission has found that the number of Privacy Act access requests (i.e., requests specifically citing the Privacy Act) has not been great and that most have come from agency employees or former employees. One reason for this may be that pre-existing law and practice continue to be used. In addition, the public's awareness of the Freedom of

[10] 5 U.S.C. 552(b)(5)

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 it. On 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 benefitted 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,[12] *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.

[12] Office of Management and Budget, *Privacy Act Guidelines*, issued as a supplement to Circular A-108, *Federal Register*, Volume 40, Number 132, July 9, 1975, pp. 28948 - 28978.

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 its 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

and law enforcement agencies to maintain unverified information obtained from intelligence or investigative sources.[13] 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,

[13] 5 U.S.C. 552a(j).

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 the 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;[14] (2) collect information to the greatest extent practicable directly from the subject individual;[15] (3) give every individual a Privacy Act Statement at the time individually identifiable information is requested of him;[16] and, (4) in certain instances, refrain from collecting an individual's Social Security number[17] and information relating to his exercise of First Amendment rights.[18]

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

[14] 5 U.S.C. 552a(e)(1).
[15] 5 U.S.C. 552a(e)(2).
[16] 5 U.S.C. 552a(e)(3).
[17] Section 7 of Public Law 93-579.
[18] 5 U.S.C. 552a(e)(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 confusing 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."[19] 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.

[19] Office of Management and Budget, Circular A-108, *op. cit.*, p. 28953.

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. 552a(b)(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.*[20] [emphasis added]

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 (RUIA). The statute requires RUIA 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 $85,000 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

[20] *Federal Register*, Volume 41, Number 181, September 16, 1976, p. 40015.

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 information flow to and between investigative agencies, the agents of investigative 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 agency. 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 agency 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 enacted disclosure statutes to the Privacy Act so that there will be no question about whether such disclosures are subject to the Act's requirements. 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,[174] 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."[175] The previous interpretation of citizen had been broad as compared to the common law requirement of interest on the part of the requesting person.[176] The current statute is very broad, with the issue of access rarely considered in Florida public records cases.[177]

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.[178] 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.[179] The Supreme Court also mentioned improving the electoral process in *Buckley v. Valeo*.[180] 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.[181] 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 *Fadjo* case.[182] The privacy interest involved should not yield to an overly broad open records statute and statutory interpretation.[183]

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 be pleasing 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.[184]

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."[185]

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.[186] 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.[187]

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

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174. *See* Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922).

175. 1975 Fla. Laws, ch. 75-225 (codified in FLA. STAT. §119.01).

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 records and books of account). *But see* [1951-1952] FLA. ATT'Y 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*.

177. *See* OP. ATT'Y GEN. FLA. 075-175 (1975).

178. 429 U.S. 589, 602 (1977).

179. 575 F.2d 1137.

180. 424 U.S. 6-67 (1976).

181. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 651, 117 Cal. Rptr. 106, 109 (1974).

182. See text accompanying notes 2-7 & 73-81 *supra*.

183. *See* Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 97 nn.13 & 14 (Fla. 1st D.C.A. 1978).

184. *Report from the Barricades*, *supra* note 9, at 17-18.

185. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 655, 117 Cal. Rptr. 106, 112 (1974).

186. See text accompanying notes 46-49 *supra*.

187. The complexity of records may create difficulty in separating information about the government from information about an individual. *See generally* STATEWIDE INFORMATION POLICY COMMITTEE, *supra* note 113.

disclosure where the "public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[188] Current judicial interpretations render such a balancing of interests impossible in Florida. This is not an argument for the primacy of privacy, but a suggestion that there are competing interests which must be considered. Given the importance of open records, the protection of privacy cannot be absolute. It is reasonable to require disclosure of individual records if the inquiring person's need to know outweighs the interest of the individual whose privacy is at stake. The fact that there may be legitimate individual interests which are protected does not mean that no information should be disclosed.[189]

It is interesting to note that the Florida Constitutional Revision Commission recognized the competing claim of privacy when considering whether to include the Public Records Law in the revised constitution. The commission considered a constitutional amendment for open records which included an exemption for "privacy interests."[190] However, the 1980 constitutional amendment establishing a state right of privacy by its own terms does not affect the application of the Public Records Law.[191] Attention should now be given in Florida to a statutory accommodation of privacy within the Public Records Law, or judicial recognition of the federal constitutional right of disclosural privacy.

Resolving the Conflict

Florida law must protect the important rights of personal privacy and access to public records. The problem lies not in justifying the value of either concept, but in resolving the conflict between the two interests in a situation where both appear to be implicated. The Fifth Circuit in *Fadjo* articulated a balancing test to weigh these interests. But the Florida supreme court rejected a balancing approach after comparing the strong public interest in disclosure manifested in the Public Records Law to what, in the court's opinion, was an unformed and amorphous right of personal privacy. Nevertheless, Florida 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.[192] The legislature designed the amendment to control collection of information rather than disclosure.[193] 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.[194] The right to privacy, as it has developed, is not absolute, and acknowledges the necessity of disclosure in certain circumstances. Justices Brandeis and Warren recognized that any rule of liability must be flexible enough to take account of the varying circumstances of each case.[195] 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.[196] 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.[197] 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

188. Cal. Gov't Code §6255 (West 1975). *See* Comment, *Informational Privacy and Public Records*, 8 Pac. L.J. 25, 36 (1977). For the balancing approach in Louisiana, see Trahan v. Larivee, 365 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. Const. art. I, 5; La. Rev. Stat. Ann. §44 (West 1940). The court found that "the public interest in efficient government is better served by keeping these evaluations confidential." 365 So. 2d at 300. In contrast, a balancing resulted in disclosure in Webb v. City of Shreveport, 371 So. 2d 316 (Ct. App.), *cert. denied*, 374 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 736.

191. See note *pra.*

192. Public Administration Clearing Service, Proposed Amendments to Florida Constitution to be on Ballot on October 7, 1980, and on November 4, 1980 Elections 17 (1980).

193. *Id.*

194. A different conclusion is reached in Comment, *supra* note 84, at 395.

195. Brandeis & Warren, *supra* note 92, at 215.

196. See text accompanying notes 139-149 *supra.*

197. See text accompanying notes 208-221 *infra.*

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*,[198] the 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.[199] 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,[200] will accommodate individual interests in privacy. The California statute was modeled after the Freedom of Information Act, and includes an exemption for records where the public's interest in non-disclosure clearly outweighs the public's interest in diclosure.[201] 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.[202]

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 disclosural privacy 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.[203] 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.[204]

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.

198. The Legislature amended the Public Records Law to provide a specific disclosure exemption for the information at issue in *Fadjo*. 1979 Fla. Laws, ch. 79-187 (codified at FLA. STAT. §119.07(3) (Supp. 1970)).

199. *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 to the Public Records Law also advance the interests of the state rather than the individual.

200. CAL. GOV'T CODE §§6350-65 (West 1980).

201. *Id.* §6255. For a description of the balancing undertaken pursuant to application of the Freedom of Information Act, see Note, *Freedom of Information and the Individual's Right to Privacy: Department of Air Force v. Rose*, 14 CAL. W.L. REV. 183 (1978).

202. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 657, 117 Cal. Rptr. 106, 114 (1974). For an analysis of the judicial interpretation of the California Public Records Act, see Comment, *supra* note 188, at 56.

203. Fadjo v. Coon, 633 F.2d at 1176.

204. This language is suggested by FREEDOM OF INFORMATION CLEARINGHOUSE, DRAFT OF MODEL LEGISLAT STATE FREEDOM OF INFORMATION ACT 6 (no date).

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. Refinement 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 disclosural 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[205] in acting as an intermediary between the various branches of government and those whom they govern.[206]

The exemption for judicial balancing suggested previously does not take into account two of the three factors[207] that determine the scope of the right of 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)[208] 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

205. Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROB. 253, 269 (1966).

206. *Id.*

207. See text accompanying note 128 *supra*.

208. UNIFORM INFORMATION PRACTICES CODE (1980). The Code was approved and recommended 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"[209] which yields when the claim to individual privacy has "greater magnitude."[210]

The Code definition of government record pertains to information maintained by an agency in written, aural, visual, electronic or other physical forms.[211] The other critical definitions in Article 1 are found in sections 1-105(5) and 1-105(8)[212] 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 requestor 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.[213] The only information that may be freely disclosed is primarily job related.[214]

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.[215] 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.[216] This is a balancing approach for case-by-case application.[217] The criteria to use, and an elaboration of examples of unwarranted invasions, are contained in section 3-102.[218]

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.[219] 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 Information[220] and Disclosure of Personal Records.[221] 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[222] protect three important public interests, beginning with the effectiveness and integrity of certain essential governmental processes. This is

209. UNIFORM INFORMATION PRACTICES CODE §1-102, Comment (1980).

210. *Id.*

211. *Id.* §1-105, Comment. The Uniform Information Practices Code is in accord with the "formalize" rule announced in *Byron, Harless*, 379 So. 2d 633 (1980). 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(8) 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(8).

213. *Id.* §3-101, Comment. The Comment provides the underlying rationale for the structure of article 3.

214. *Id.* §3-101(1).

215. *Id.* §3-101(3)(10).

216. *Id.* §3-101(10). The Comment to this section provides the justification for the language "clearly unwarranted of personal privacy." UNIFORM INFORMATION PRACTICES CODE §3-102, 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 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 §3-102, Comment (1980).

218. UNIFORM INFORMATION PRACTICE CODE §3-102 (1980).

219. The Comment on Subsection (b) states: "The enumeration is not intended to be exhaustive. But once a subsection (b) or comparable privacy interest is demonstrated, the agency will have to assume the burden of carefully balancing such an interest with the public interest and need for access to those documents. If one of the nine examples applies to a request, there is a strong privacy interest in not publicly releasing the records." *Id.* §3-102, Comment.

220. *Id.* art. 2.

221. *Id.* art. 3.

222. *Id.* §2-103.

accomplished by exempting from mandatory disclosure certain law enforcement 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 administered 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.[223] 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 considerably the exemption's broad language.[224] 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 procedures 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.[225] The procedures ensure full agency appraisal of considerations favoring non-disclosure before disclosure is made.[226] 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-disclosural information and provide public access to the remainder of the record.

The major drawback to article 2, section 2-103 is that it gives agencies wide discretion in deciding whether an exemption applies; for the Code provides no mandatory exemptions. Once the agency decides to disclose and gives notice of that intention, the objector must bring an independent state action to enforce non-disclosure. Article 2, section 2-103 does not create a right to enjoin agency disclosure of arguably exempt information. This provision places too great a burden on the agency. There are certain classes of records, which should carry a presumption of non-disclosurability, which is then rebuttable through standardized procedures. The UIPC provision, as written, places excessive discretion in the individual government agency without providing concomittant procedural safeguards for asserted individual privacy interests. The Code authors justify this procedure as one which furthers the primary policy of access to all governmental records.

If article 2, however, is read in conjunction with article 3, there is a rebuttable presumption of non-disclosure of certain categories of information. The problem is that the bifurcated structure of the Code establishes different standards for non-disclosure and disclosure depending on the initial determination of placement within article 2 or article 3. The policies of public access and individual privacy can be better accommodated by a less confusing statutory framework.

The UIPC provisions on segregation and notice should be adopted in Florida. The segregation principle isolates justifiably exempt information from the general policy of access. This provides for the accommodation of conflicting legitimate interests, while retaining a general policy of open access to government-held information. The notice provision adequately provides for the assertion of privacy interests through the adversary system. Under the UIPC notice provisions, the individual affected by a threatened disclosure, or another party with a recorded interest in the non-disclosure of government-held information, has the opportunity to argue against disclosure. This procedure adequately protects an individual's privacy interest while still favoring the presumption of free access.[227]

UIPC section 3-103 concerns accessibility of individually identifiable information between government agencies. The Code recommends a general policy of disclosure of personal information between agencies when the requested information is certified as pursuant to, and in furtherance of, the requesting agency's "performance of its duties and functions."[228] This exemption to the general policy of non-disclosure of personal information supports the overriding policy of disclosure made in the public interest. In addition, there are specifically enumerated provisions which allow disclosure of personal information to the state archives for historical preservation, law enforcement and judicial investigations, authorized audits of the agency and census activity. Nevertheless, section 3-103(b) still provides protection for the individual's interest in privacy by subjecting the receiving agency to the same disclosural restrictions placed upon the originating agency.[229] This section significantly qualifies the no notice standard applicable to inter-agency transfer, and provides protection for individual private interests.

There is a problem inherent in this provision, however, which requires modification before adoption can be recommended. In the section's present wording on inter-agency disclosure, an individual would have no notice of the

223. For an opposing view on the need to insert a "confidentiality" consideration to assure public access and reasonable personal privacy, see text accompanying note 100 *supra*.

224. See note 222 *supra*.

225. For a discussion of the reasons for inclusion of notice and consent procedures to protect privacy interests see Vache & Makibe, *Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation*, 14 GONZ. L. REV. 515, 555 (1979).

226. UNIFORM INFORMATION PRACTICE CODE §2-103, Comment.

227. The following states have enacted legislation limiting access to and subsequent dissemination of government held information that is individually identifiable: ARK. STAT. ANN. §16-804 (1977); CAL. CIVIL CODE §1798.1(c) (West 1977); CONN. GEN. STAT. ANN. §§4-190 to 4-197 (West Supp. 1980); IND. STAT. ANN. §4-1-6 (Burns 1978); KY. REV. STAT. ANN. §§61.870-884 (Baldwin Supp. 1980); MINN. STAT. ANN. §15.16 (West 1979); OHIO REV. CODE ANN. §§1347.01-.99 (Page 1977); OKLA. STAT. ANN. tit. 74, §118.17 (West Supp. 1980); UTAH CODE ANN. §§63.2-85.4(6) (1979); VA. CODE §§2.1-377, 386 (1976); WASH. REV. CODE ANN. §§43.105.041(4)-.070 (1973). *See* R. SMITH, *supra* note 20.

228. UNIFORM INFORMATION PRACTICES CODE §3-103(1), Comment (1980).

229. *Id.* §3-103(b).

transfer between government agencies until a request for disclosure triggered the notice requirements of article 2, section 2-102.[230] 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 cogent 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.[231]

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.[232]

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 personal privacy and permits the Florida courts to balance that interest against the interest in access to public records. The legislature may choose to go beyond establishing a balancing standard for judicial application and delineate the scope of access and define records so as to assist the agencies and the court in reconciling the conflict between privacy and access.

230. *Id.* §2-102.

231. 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 Sup. Ct. Rev. 199.

232. O'Brien *supra* note 56, at 84.

University of Hawaii at Manoa

Institute for Peace
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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 On-Campus Jobs that Students

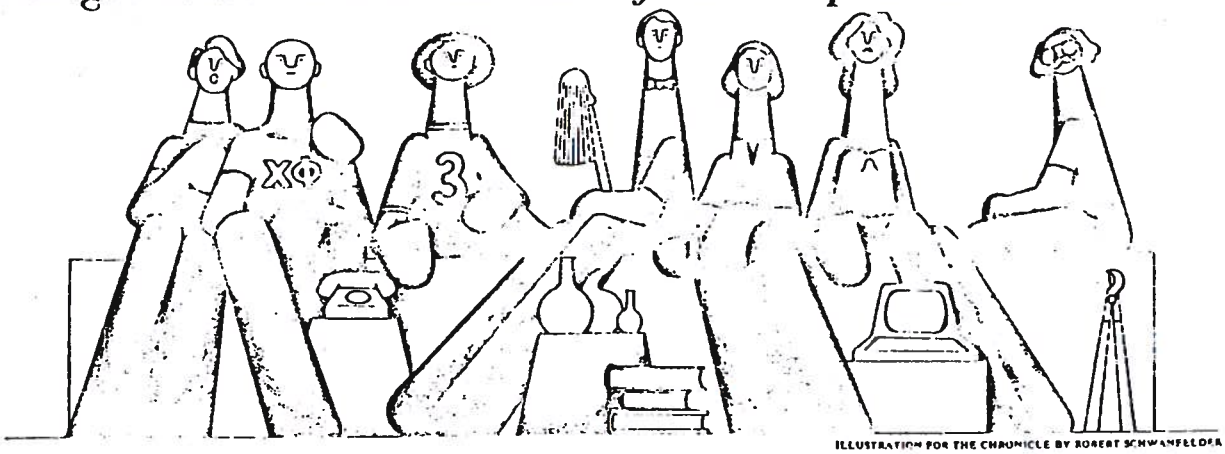

ILLUSTRATION FOR THE CHRONICLE BY ROBERT SCHWANFELDER

By Thomas V. DiBacco

ONE of the most significant changes in academe 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 1950's, 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 for students employed full time. Student employees accrue 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 fired 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 surmise 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 blasé 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 academe.

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 incompetent or who otherwise don't measure up, after all, no other employee would cost the institution so little in terms of the total academic budget. They also recognize that adolescents are by definition immature, bound to make mistakes, and at times fail to do their best. Therefore, they usually treat their students' shortcomings with sensitivity and tolerance. In the classroom, a student's poor performance penalizes only him or her; in the academic work 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 put at risk 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 monotonous, than the ones students currently hold. But such work provides a valuable educational lesson. I remind 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.

OPINION

It's Possible to Conduct Tenure Evaluations Openly and Not Lose Reviewers' Candor or Faculty Quality

By Christine Maitland

THE LAWSUIT over the University of California's confidential review process has led to renewed debate in academe 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 helped [illegible] a political issue and disagreed with the administration. The president claimed the professor's scholarship was inadequate, but his file showed that he had published several articles in a prestigious international journal, had received excellent teaching evaluations, and had a record of outstanding service. The review committees had unanimously recommended that he be promoted. The arbitrator overruled the president's objections.

Another faculty member was denied promotion because, it became clear from the material in his file, the reviewers did not understand his research. In that case, the arbitrator ordered an external evaluation of the professor's work by qualified reviewers. They wrote a positive recommendation, and, after another review, the president promoted him.

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; the people who receive negative ratings know why.

Christine Maitland is a grievance-arbitration specialist for the California Faculty Association, faculty bargaining agent in the California State University System.

GEORGE R. ARIYOSHI
GOVERNOR

WAYNE MINAMI
ATTORNEY GENERAL

LARRY L. ZENKER
ASSISTANT ATTORNEY GENERAL

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

FEB 23 '79

February 27, 1979

MEMORANDUM

TO: John Farias
Chairman, Board of Agriculture

FROM: Leo B. Young
Deputy Attorney General

SUBJECT: Release of Information; Kauai Task Force

Enclosed is a legal memorandum prepared by Maurice Kato dated February 5, 1979 and my memorandum dated September 22, 1978.

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.

GEORGE R. ARIYOSHI
GOVERNOR

ATTORNEY GENERAL
WAYNE MINAMI
LARRY L. ZENKER
ASSISTANT ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813

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, 1978," 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.

Maurice S. Kato

MAURICE S. KATO
Deputy Attorney General

MSK/lmb

File

GEORGE R. ARIYOSHI
GOVERNOR

LBY:kat

RONALD Y. AMEMIYA
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
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See memory
5-3-78

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.

Department of Agriculture (DOA) Regulation 10: Importation of dogs and cats adopted August 16, 1977; DOA Regulation 105: Relating to the Use of Facilities at an Animal Quarantine Station adopted October 31, 1974; and DOA Regulation 106: Quarantine of premises, Animals and Effects adopted October 31, 1974 do not require any specific entry on the animal record cards AQS 13 and 14.

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 supersensitivities ... . 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. Shultz, 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.

A federal court has found that disclosure of family status, including not living alone, and family control in the household is an unwarranted invasion of privacy. Wine Hobby U.S.A., Inc. v. U.S. Internal Revenue Service, 502 F.2d 133 (3d Cir. 1974). Disclosure of a report of an investigation into government housing discrimination would release "intimate details", thereupon being an unwarranted invasion of privacy. Rural Housing Alliance v. U.S. Dept. of Agriculture, 511 F.2d 1347 (D.C. Cir. 1974). The bare names and addresses of voters in a union election may be disclosed without violation of one's right of privacy. Getman v. N.L.R.B., 450 F.2d 670, stay denied, 404 U.S. 1204 (1971).

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 determine that the forms are not public records open for inspection 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 true 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 exercised 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 Am.Jur.2d Libel and Slander § 3 (1970).

"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.

Leo B. Young
Deputy Attorney General

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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 over 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 private 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 $1,042 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 that, 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 put your name down; they're using information without following through to see if it's 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 $5,814 college loan. Mr. Harris assured the agency that he had never taken out a student loan. He said that 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, which resulted in his rejection for a car loan. Only after Rep. Edwards interceded 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 Selective 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 Parlors for free sundaes 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-

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Abusive Computers: As Government Keeps Track Of People More Effectively, False Accusations Rise

Continued From First Page

gle case of abuse so far, the post office says.

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, too," 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 of 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 asn't any right to 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 drastically 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 in overpayments for 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 ould create privacy problems, too, hough, because it would encourage officials to develop computer systems that instantly scroll through a host of personal records. Few states have such quick access to personal files now; instead, they must send for computer tapes 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.

Computerized tracking in the U.S. now begins at age five, when, under a provision in last year's tax-revision 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 stored in different data banks. "They're tracking from cradle to grave," says Jim 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-racketeering statutes. 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 criminal histories. 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 data base so that police officials can trace individuals suspected—but not accused—of 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 1985 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 499 pounds and 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 have 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 Frazier, who is wanted for parole violations. The two men look somewhat alike, and Mr. Frazier 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 tattered letter from the Brownsville, Texas, district attorney's office describing his predicament and vouching that his fingerprints aren't the same as Mr. Frazier'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. Frazier.

For now, Mr. Arcenaux keeps a low profile. He uses a pseudonym, Coco Robicheaux, for his art, and he avoids getting his name into government computers as much as possible. "I'm living like Daniel Wayne Frazier," he says. "I'm always on the lookout. I could be mistaken for this guy at any time."