

Office of Information Practices

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MEMORANDUM

TO: All State Department Heads
All County Department Heads and Directors

FROM: Moya T. Davenport Gray
Director

SUBJECT: OIP Guidance Regarding Disclosure of Agency Records and
Information to Auditors

INTRODUCTION

This memorandum provides guidance on disclosure of State and county agency records and information to auditors. This memorandum does not have the force and effect of law. It is intended to assist agencies in responding to requests for records and information from auditors in accordance with the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

This memorandum applies to government records maintained by all State and county agencies, including the executive branch agencies, the State legislature, the county councils, and the administrative functions of the State judiciary.

I. The UIPA

The UIPA governs disclosure of records and information of all Hawaii State and county agencies. The UIPA operates on the presumption that all government records are open for public inspection and copying unless an exception to disclosure applies. Haw. Rev. Stat. § 92F-11 (1993).

There are only five exceptions to this general rule of disclosure. They are as follows:

92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Haw. Rev. Stat. § 92F-13 (1993). These exceptions to disclosure may be invoked by an agency, when appropriate, in response to record requests from the public. Agencies may also choose not to invoke these exceptions, and disclose records even though one of the exceptions could be invoked.

II. Confidentiality Statutes

When an agency's records are subject to a specific confidentiality statute, section 92F-13(4), Hawaii Revised Statutes, applies. If the agency has questions regarding the language of the confidentiality statute and

whether it applies to records requests of auditors, it should contact the OIP or its own attorney.

III. Privacy

Of the five exceptions listed above, the OIP notes that the first exception, for records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, is most commonly at issue when records are requested by an auditor.

Section 92F-14(b), Hawaii Revised Statutes, and OIP opinions interpreting the UIPA, list some examples of information in which individuals possess significant privacy interests. These include, but are not limited to:

- Home address
- Home telephone number
- Birth date
- Social security number
- Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation (other than directory information while an individual is present at a government facility)¹
- Applications (e.g. employment, employment benefits)
- Nominations
- Recommendations (e.g. employment)
- Proposals for public employment or appointment to a government position
- Nongovernmental work experience for non-employees (except records necessary to demonstrate compliance with requirements for a particular government position)
- Financial information (e.g. an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness)
- Personal recommendations
- Evaluations

¹ Some medical information is also subject to the federal Health Insurance Portability and Accountancy Act of 1996. As the OIP does not have jurisdiction to opine directly on federal laws, agencies should contact their own attorneys when disclosure of medical information is at issue.

- Civil service examination scores
- Information relating to retirement allowance or pension benefits.

DISCLOSURE TO NON-GOVERNMENTAL AUDITORS

Disclosure to auditors that are not part of State or county government can be problematic because such disclosures are considered public disclosures under the UIPA. If the auditors seek records or information that contain privacy interests, such as those listed above, disclosure is potentially a clearly unwarranted invasion of personal privacy under sections 92F-13(1) and 92F-14(a), Hawaii Revised Statutes, unless there is a specific legal requirement that the information be shared with an auditor. To avoid liability for unconstitutional invasions of privacy, prior to making such disclosures, agencies should ensure that privacy rights of any individuals are adequately protected.

Perhaps the easiest way to ensure that privacy interests are protected is to obtain a written consent from each individual whose information the agency intends to disclose. Once the individual has consented in writing, the disclosure is permitted. The agency should also obtain a written assurance from the auditor that it will use the information for the limited purpose of the audit, that it will not make further disclosures of the information, and that it will return all copies of the records it received when the audit is completed. Information carrying privacy interests that an auditor does not require should not be disclosed.

The issues of: (1) whether to disclose if an individual does not consent, and (2) how to treat a voluminous request from an auditor in which obtaining consent from each individual is not feasible, have not been opined on by the OIP. Absent consent, an agency should only disclose personal information if the public interest in the information outweighs any privacy interests therein. Haw. Rev. Stat. §92F-14(a) (Supp. 2001). This balancing of public versus private interests must be weighed on a case-by-case basis.

DISCLOSURE TO INTERNAL AGENCY AUDITORS

The UIPA does not specifically address sharing of information within a department between different units. When an internal auditor requests records of a unit of an agency, the OIP recommends agencies abide by the advice set forth in the OIP Opinion Letter Number 95-10, which states that whether records carrying privacy interests may be disclosed *within an agency*

depends on whether the persons to whom the information will be disclosed have an official need to know the information. OIP. Op. Ltr. No. 95-20 at 9 (May 4, 1995). Agency officers and employees who do not have an official need to have access to records or information containing privacy interests should not have access to that information. Internal auditors may have such an official need to know.

DISCLOSURE TO THE LEGISLATIVE AUDITOR

The State Auditor is required by statute to “conduct postaudits of the transactions, accounts, programs, and performance of all departments, offices, and agencies of the State and its political subdivisions.” Haw. Rev. Stat. § 23-4 (Supp. 2001). The State Auditor reports annually to the Legislature, and reports findings of individual audits to the Governor, the Legislature, and County councils, if appropriate. Haw. Rev. Stat. §§ 23-7, 23-9 (1993).

In furtherance of these duties, the State Auditor is allowed by law to “examine and inspect all accounts, books, records, files, papers, and documents and all financial affairs of every department, office, agency, and political subdivision.” Haw. Rev. Stat. § 23-5(a) (Supp. 2001). The State Auditor may also conduct searches, and may issue subpoenas and subpoenas duces tecum. Haw. Rev. Stat. § 23-5 (Supp. 2001). These laws give the State Auditor express authority to obtain records and information from agencies. If an agency receives a request for records or information from the State Auditor pursuant to the Auditor’s official duties, it should comply with the request.

The State Auditor’s authority to obtain records and information is also recognized by the UIPA. The UIPA allows agencies to share their records, including records that would not normally be disclosed publicly, with the Auditor:

§92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

...

- (9) To the office of the legislative auditor, the legislative reference bureau, or the ombudsman of this State for the performance of their respective functions; . . .

Haw. Rev. Stat. § 92F-19 (1993).

FEDERAL FUNDING

It is important to note that agencies are not required to comply with the UIPA when federal assistance or funding may be jeopardized. Section 92F-4, Hawaii Revised Statutes, states:

§92F-4 Funding, services, and other federal assistance.

Where compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance.

Haw. Rev. Stat. § 92F-4 (1993). This provision was enacted to prevent agencies from being denied federal funding, services, or other assistance when compliance with the UIPA would conflict with federal statutory or regulatory provisions. See H. Stand. Comm. Rep. No. 1725-82, 16th Leg., 1992 Reg. Sess. Haw. H.J. 1564 (1992); see also S. Stand. Comm. Rep. No. 2014, 16th Leg., 1992 Reg. Sess. Haw. S.J. 963 (1992). Please note, however, that section 92F-4, Hawaii Revised Statutes, does not give an agency authority to disclose records or information that is made confidential by other laws outside of the UIPA, or by court orders.

When relying on section 92F-4, Hawaii Revised Statutes, agencies should keep in mind that only information that is necessary for the specified purpose of the audit should be disclosed. For information that is protected from disclosure by a State or federal law, the OIP also recommends that the auditor sign a confidentiality agreement promising not to further disclose the information, and to return all copies. Information that an auditor does not require should not be disclosed.

DECEASED INDIVIDUALS

The issue of whether privacy rights that existed while a person was alive can be exercised after death is not fully settled in this State. The OIP has issued an opinion letter indicating that no privacy rights in government records exist after death. See OIP Op. Ltr. No. 97-2 (Mar. 11, 1997). Rules adopted by the federal Department of Health and Human Services, which became effective April 14, 2001, recognize a privacy interest in protected health information following an individual's death. Standards for Privacy of Individually Identifiable Health Information, codified at 45 C.F.R. § 164-502(f). When the issue arises as to whether there is a privacy interest in information relating to a deceased individual, an agency should consult with the OIP, or its own attorney.

LIABILITY

The UIPA makes it a criminal misdemeanor for agency employees to intentionally disclose records or information that are protected by confidentiality statutes. Haw. Rev. Stat. § 92F-17(a) (1993). It is also a criminal misdemeanor for anyone to intentionally gain access to government records by false pretense, bribery, or theft, with actual knowledge that disclosure is prohibited. Haw. Rev. Stat. § 92F-17(b) (1993). The UIPA provides immunity from civil and criminal liability to anyone who, in good faith, discloses or does not disclose a government record. Haw. Rev. Stat. § 92F-16 (1993).

Wrongful disclosure of information containing privacy interests could also subject an individual or an agency to a civil lawsuit for invasion of privacy based on State constitutional provisions protecting privacy.

CONCLUSION

Please distribute copies of this memo to your employees and file copies in your UIPA Reference Manuals for ready reference. If you have any questions about this memo, or about compliance with the UIPA, please feel free to contact me for further assistance.

CMD: ankd