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July 17, 2003

The Honorable Georgina K. Kawamura
Director, Department of Budget and Finance
P.O. Box 150
Honolulu, Hawaii 96810-0150

Re: Disclosure of Grievance File to the Office of the Legislative Auditor

Dear Ms. Kawamura:

This is in response to your request to the Office of Information Practices ("OIP") dated June 27, 2003 for an opinion on the above-referenced matter.

ISSUES PRESENTED

- I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), State agencies are required to disclose grievance files to the Office of the Legislative Auditor ("Auditor").
- II. Whether, under the UIPA, State agencies are required to obtain consent by employees named in grievance files before disclosure to the Auditor.

BRIEF ANSWERS

- I. Yes. There is a State law that authorizes disclosure of all government records to the Auditor. Therefore, under the UIPA, disclosure is required as a matter of law.
- II. No. The UIPA's mandatory disclosure provisions are to be read in the disjunctive, i.e., as expressing alternative categories of documents that must

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be disclosed as a matter of law. Therefore, if one of the categories of records listed in section 92F-12(b), Hawaii Revised Statutes, requires disclosure, an agency must disclose the records, as a matter of law. As there is a state law that requires disclosure to the Auditor, the prior written consent of all individuals referred to in the grievance file is not necessary before disclosure to the Auditor.

FACTS

Act 94, passed in the 2003 legislative session, took effect on May 28, 2003, and requires the Auditor to:

conduct a management audit of the public utilities commission to assess the adequacy of the present utility regulatory process in dealing with issues, problems, and developments in complex and changing areas, such as telecommunications, energy deregulation, and intergovernmental relations and submit a report of findings and recommendations to the legislature and governor before the convening of the regular session of 2004.

A Bill for an Act Relating to the Public Utilities Commission, Act 94, 2003
Haw. Session Laws.

Pursuant to Act 94, the Auditor initiated a management audit of the Public Utilities Commission ("PUC") and, as part of the audit, sought access to a grievance file maintained by the PUC, an agency administratively attached to the Department of Budget and Finance ("B&F"). Via an e-mail dated June 26, 2003, B&F advised the OIP that the grievance file contains:

- investigation report to the Director, B&F, with details of all parties' accounts of the incidents of alleged misconduct or inappropriate behavior;
- findings;
- recommendations for remedy which does not involve suspension or discharge; and
- letters to the Union and to the respondent on findings and grievance resolution.

Your June 27, 2003 letter requested the OIP's written guidance on (1) whether B&F is required to disclose the requested records to the Auditor, and (2) if so, whether B&F is required to obtain consent by the employees named in the grievance file before disclosure to the Auditor.

DISCUSSION

I. REQUIRED DISCLOSURE TO THE AUDITOR

Under the UIPA, if there is a federal law or State statute which expressly authorizes a person¹ to have access to government records,² an agency³ is required to disclose the records, "any provision to the contrary notwithstanding." Haw. Rev. Stat. § 92F-12(b)(2) (1993). In other words, those records listed in section 92F-12(b)(2), Hawaii Revised Statutes, must be made available to the person (in this case, a government agency) requesting the record, as a matter of law. This is the case even where a provision contained elsewhere in the UIPA would, in the absence of section 92F-12(b)(2), authorize an agency to withhold access to the public.⁴

As noted above, Act 94 directs the Auditor to conduct a management audit of the PUC.⁵ To perform her duties, the Auditor is expressly authorized to have access to all records of every department:

[t]he auditor may 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. 2002). Agency officers and employees are also required to furnish agency records to the Auditor:

¹ The UIPA's definition of "person" includes a government agency. See Haw. Rev. Stat. § 92F-3 (1993).

² "Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

³ "Agency" means "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the non-administrative functions of the courts of this State." Haw. Rev. Stat. § 92F-3 (1993).

⁴ The OIP notes, however, that in the case of agency records which are authorized to be withheld from the public by section 92F-13, Hawaii Revised Statutes, that section 92F-19(a)(9), Hawaii Revised Statutes, authorizes such disclosure to the Auditor. As your inquiry is limited to the issue of required disclosure, the OIP limited its discussion of the UIPA to section 92F-12(b)(2), Hawaii Revised Statutes.

⁵ Moreover, the Auditor is required 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(a) (Supp. 2002).

[t]he auditor may cause search to be made and extracts to be taken from any account, book, file, paper, record, or document in the custody of any public officer without paying any fee for the same; and every officer having the custody of the accounts, books, records, files, papers, and documents shall make such search and furnish such extracts as thereto requested.

Haw. Rev. Stat. § 23-5(b) (Supp. 2002).

From the plain language of the statute, the OIP has no difficulty in finding that State law authorizes the Auditor to obtain any and all records held by the PUC relevant to the management audit, including records such as the described grievance file. Accordingly, the OIP concludes that the UIPA requires B&F to disclose the grievance file to the Auditor, as a matter of law.⁶

II. CATEGORIES OF RECORDS THAT MUST BE DISCLOSED AS A MATTER OF LAW

You asked whether B&F is required to obtain consent of the employees named in the grievance file before disclosing it to the Auditor. To answer this question affirmatively, the OIP would have to interpret section 92F-12(b), Hawaii Revised Statutes, to require that all the categories listed therein be satisfied before a record must be disclosed. Although the statute contains the conjunction “and” in identifying the situations where disclosure is mandated, the OIP must conclude that only one category need be satisfied to require disclosure, as a matter of law. Any other interpretation would be illogical. The OIP finds support for this opinion in the UIPA's legislative history. The Legislature explained as follows:

In addition, however, the bill will provide, in Section –12, a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions for personal privacy and for frustration of legitimate government purpose are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure.

⁶ The OIP notes that the UIPA may restrict public disclosure by the Auditor of information provided to the Auditor by B&F. See Haw. Rev. Stat. § 19(b) (1993).

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S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988) (emphasis added).

Given this legislative history, the OIP finds that any other construction of section 92F-12(b), Hawaii Revised Statutes, "would produce an absurd or unjust result, inconsistent with the polices of the statute." Kahana Sunset Owners Ass'n v. Maui County Council, 86 Haw. 132, 134, 948 P.2d 122, 124 (1997). See also Haw. Rev. Stat. § 1-18 (1993). Therefore, the OIP concludes that the list of records required to be disclosed must be read disjunctively, with each category in the list forming a discrete basis for mandatory disclosure. Thus, before disclosure to the Auditor, there is no need for B&F or any other entity to obtain the prior written consent of the individuals to whom the record refers.⁷

CONCLUSION

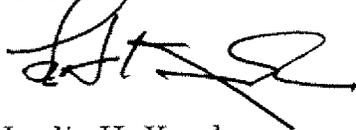
State law authorizes disclosure of all agency records to the Auditor. Under the UIPA, if there is a state law that expressly authorizes disclosure to a government agency, the record must be disclosed, as a matter of law. The UIPA must be construed to require that each category listed in section 92F-12(b), Hawaii Revised Statutes, constitutes a discrete basis for requiring disclosure, as a matter of law.

Very truly yours,



Susan R. Kern
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

SRK: ankd

⁷ See Section 92F-12(b)(1), Hawaii Revised Statutes which requires disclosure of "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers."