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December 17, 2003

Mr. Thomas A. Marzec

Re: Oversight Committee for the First Circuit Family Court

Dear Mr. Marzec:

You have asked the Office of Information Practices ("OIP") for an opinion on whether the Judiciary's denial of your request for records relating to the Oversight Committee for the First Circuit Family Court ("Oversight Committee"). This letter responds to your request for an opinion.

ISSUES PRESENTED

I. Is the Oversight Committee an administrative function of the Judiciary and thus subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA")?

II. Are the Oversight Committee's records required to be disclosed under section 92F-12(16), Hawaii Revised Statutes, as minutes of a meeting open to the public?

III. Would release of the requested records frustrate a legitimate government function and thus fall under an exception to disclosure under the UIPA?

BRIEF ANSWERS

I. That portion of the Oversight Committee's work that involves raising issues relating to court rules and other matters that control the conduct of litigation and regulate the interaction between litigants and the courts is a nonadministrative function of the Judiciary, and hence not subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (1993). However, OIP will assume without deciding that some part of the Oversight Committee's work would involve raising issues relating to administrative functions of the Judiciary, and OIP will therefore address the second and third issues.

II. The Judiciary is not required to hold open meetings under part I of chapter 92, Hawaii Revised Statutes, and the Oversight Committee meetings were closed. Thus, the records are not minutes of a meeting open to the public.

III. The requested records as a whole are predecisional and fall within the deliberative process privilege. In addition, some portions of the records would disclose the identity of a confidential source. Thus, the records may be withheld because their release would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993).

FACTS

Mr. Thomas A. Marzec made a request for records dated September 10, 2002, to the Family Court of the First Circuit. He requested "all records and information concerning the makeup, structure, organization, and outputs of this Oversight Committee; its members and how they are selected (including term lengths); all meeting minutes and recommendations, reports, or written products; and any other records relating to the Oversight Committee's role with respect to, and effect upon, Family Court."

Judiciary Staff Attorney Jodie Hagerman, Esq., responded to Mr. Marzec's request in a letter dated September 30, 2002. Ms. Hagerman's letter was apparently an extension of time, although she did not provide a date by which a Notice to Requester would be sent. See Haw. Admin. R. § 2-71-13(c) (1998). On October 8, 2002, Ms. Hagerman wrote to give Mr. Marzec background information on the Oversight Committee and denied his record request. Ms. Hagerman did not argue that the records represented a nonadministrative function of the courts, but instead based the denial on section 92F-13(3), Hawaii Revised Statutes, which permits withholding

records whose disclosure would frustrate a legitimate government function. Ms. Hagerman subsequently confirmed that notes taken by the Honorable Allene R. Suemori of the discussions at Oversight Committee meetings are the only records responsive to Mr. Marzec's request.

Ms. Hagerman described the Oversight Committee in her letter of October 8, 2002:

> The committee consists of Judge Allene R. Suemori and members of the Family Law section of the Hawai'i State Bar Association. The President of the Family Law bar selects which members may be present at each meeting. Meetings are held during Judge Suemori's lunch hour, on mutually convenient days, usually every two or three months, or when either Judge Suemori or the bar have issues they wish to discuss. The committee is not a policy making committee. Rather, Judge Suemori acts as a liaison between the committee and the Senior Family Court Judge on issues the committee deems to merit review. Judge Suemori's participation on the committee is purely voluntary and not mandated by the Judiciary. Judge Suemori keeps summary notes of what was discussed at the meetings and distributes copies to those members attending.

Ms. Hagerman has further clarified that the issues passed on through the Oversight Committee are regarding system changes and improvements which would help the overall handling of all divorce cases. Since that time, according to Ms. Hagerman, Judge Suemori has been rotated out of the division and it is unclear whether another judge will resume the Oversight Committee meetings. The last meeting was held in 2002.

DISCUSSION

I. THE OVERSIGHT COMMITTEE MEETINGS WERE NOT REQUIRED TO BE OPEN TO THE PUBLIC

The Judiciary is not required to follow the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes. Haw. Rev. Stat. § 92-6 (1993). The Oversight Committee meetings were apparently by invitation only. Thus, Judge Suemori's notes of the meetings were not minutes of a proceeding open

to the public, and are not required to be disclosed by section 92F-12(16), Hawaii Revised Statutes (Supp. 2003).

II. WHETHER THE OVERSIGHT COMMITTEE IS AN "AGENCY" SUBJECT TO UIPA

The UIPA's record disclosure requirements apply to an "agency." By definition, the nonadministrative functions of the Judiciary are excluded from being part of an "agency" subject to the UIPA. Haw. Rev. Stat. § 92F-3 (1993).

Although the Judiciary initially assumed that the Oversight Committee was an administrative function of the Judiciary and thus subject to the UIPA, the Judiciary subsequently argued (in a letter to Mr. Marzec dated January 16, 2003) that the Committee in fact served a nonadministrative purpose. OIP Op. Ltr. No. 93-8 (Aug. 2, 1993) discusses the distinction between administrative and nonadministrative functions at some length. In essence, the question is whether a function of the Judiciary involves considered decision-making or ministerial action. OIP Op. Ltr. No. 93-8 (Aug. 2, 1993) at 15-16. According to a Connecticut court's approach, quoted approvingly by OIP, "'administrative functions' exclude matters involved in . . . the adoption of rules of court 'that directly control the conduct of litigation,' or that 'set[] the parameters of the adjudicative process that regulates the interactions between individual litigants and the courts.'" OIP Op. Ltr. No. 93-8 (Aug. 2, 1993) at 6, quoting Rules Committee of the Superior Court of Connecticut v. Freedom of Information Commission, 472 A. 2d 9, 15 (Conn. 1984). By contrast, administrative functions include such matters as judicial assignments and scheduling. OIP Op. Ltr. No. 93-8 (Aug. 2, 1993) at 6-7, citing Haw. Rev. Stat. §§ 601-2 and-3 (Supp. 1992) and Rules Committee, supra, at 14-15.

The Oversight Committee seems to represent a fact-gathering part of the process of considered decision-making regarding appropriate rules of court, rather than a purely ministerial function. The Oversight Committee itself does not make policy recommendations, but some of the issues which it seeks to bring to the attention of the Family Court could provide the basis for future rule change recommendations by the Judiciary regarding "the parameters of the adjudicative process." At the same time, some of the issues raised by the Oversight Committee may have related to administrative matters, such as judicial schedules. Assuming that to be the case, the Oversight Committee thus contributes to both a non-administrative function

of the Judiciary – developing recommendations for changes to court rules – and an administrative function – judicial assignments and scheduling. It is not clear whether a record that relates partly to administrative functions and partly to non-administrative functions of the Judiciary is partially subject to disclosure under the UIPA. OIP need not decide whether the Oversight Committee records fall partly within the UIPA, however, because even assuming for the sake of argument that the UIPA applies to the notes, they fall within an exception to disclosure as discussed below.

II. THE UIPA'S FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION EXCEPTION

OIP will assume for the sake of argument that the notes are partially subject to the UIPA, and address the Judiciary's denial of access on the basis that their disclosure would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993). The Judiciary raises two forms of the frustration exception: protection of a confidential source, and deliberative process privilege.

A. Legitimate Government Function

Mr. Marzec argues that the Oversight Committee does not represent a legitimate function of the Judiciary because it is voluntary. However, we find no support for the proposition that an agency acts outside its legal authority whenever it undertakes to do something not specifically required by law. The Judiciary's continuing effort to improve its operations is certainly within the Judiciary's authority, and as such a legitimate function of the Judiciary. Judge Suemori's voluntary actions toward that end are likewise part of this legitimate function.

Mr. Marzec has also argued that the Oversight Committee may not be a legitimate function of the Judiciary because it may in fact be a forum for *ex parte* communications between individual family law attorneys and Judge Suemori, contrary to rules of ethics and rules of court. Mr. Marzec has not provided OIP any evidence or written argument to support this contention. In response to OIP's request to know whether any *ex parte* communications took place in the meetings, the Judiciary confirmed that there was no discussion of specific cases at the meetings, but that the discussion instead was of policy, court mechanics, and the status of amendments to child support guidelines. In the absence of any evidence to support Mr. Marzec's allegation, OIP declines to find any reasonable basis to suppose that

members of the bar and the bench may have used the Oversight Committee to violate ethical and court rules. Rather, OIP will accept the Judiciary's statement that no discussion of specific cases took place, and will not require the Judiciary to provide the notes in question for *in camera* review.

B. Types of Frustration

1. Confidential Source

The Judiciary argues that public disclosure of the notes would make family law attorneys less willing to openly discuss issues they feel need improvement. This argument is supported by the fact that the Judiciary has ceased holding meetings of the Oversight Committee due in part to the uncertainty about whether Judge Suemori's notes of meetings must be disclosed.

Consistent with OIP's previous opinions, the Judiciary has the discretion to withhold the identities of those raising concerns about the Family Court under an expectation of confidentiality. See, e.g., OIP Op. Ltrs. No. 99-7 (Nov. 23, 1999) and 99-8 (Nov. 29, 1999). The information that may be withheld extends to the identity of source and information that would identify the source. Id. Thus, by itself, protection of confidential sources would likely not justify withholding everything in the notes. However, the Judiciary has raised another type of frustration, as discussed below.

2. Deliberative Process Privilege

The Judiciary also argues that the notes are deliberative and predecisional, as they summarize discussions and suggestions for changes and improvements to the Family Court, that may or may not be acted upon by the Family Court. Again, the argument that disclosure would chill participation is supported by the fact that the threat of disclosure has been a factor in the meetings' cessation.

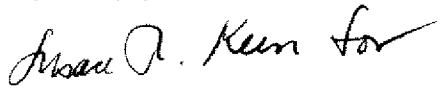
Although the Oversight Committee does not make policy or act as a body to create recommendations for policy changes, its discussions do involve suggestions by the individual participants for improvements to the Family Court. They do, therefore, qualify as deliberative. See OIP Op. Ltr. No. 00-01 at 5 (Apr. 12, 2000). The fact that they originated from outside the Family Court does not alter their deliberative quality, as they were solicited by the Family Court through the Oversight Committee process. Id. The

suggestions discussed by the Oversight Committee were also predecisional, as the Family Court had yet to decide whether to act upon them. Thus, Judge Suemori's notes summarize discussions that were both deliberative and predecisional, and the Judiciary had the discretion to withhold them from public disclosure. Id.

CONCLUSION

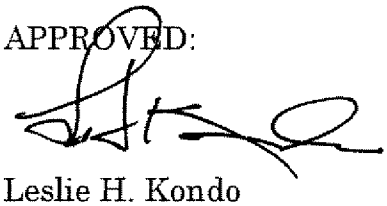
Some portion of the notes, and possibly all of the notes, relate to non-administrative functions of the Judiciary and are thus not subject to the UIPA's disclosure requirements. See Haw. Rev. Stat. § 92F-3 (1993). However, even assuming that the notes at issue are subject to the UIPA, they fall within the deliberative process privilege, a form of the frustration exception to disclosure under the UIPA. See OIP Op. Ltr. No. 00-01 (Apr. 12, 2000). In addition, those portions of the notes that would identify a confidential source would also fall under the frustration exception. See OIP Op. Ltrs. No. 99-7 (Nov. 23, 1999) and 99-8 (Nov. 29, 1999). The Judiciary was therefore justified in denying Mr. Marzec's request for access to the notes.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

JZB:ankd

cc: Jodie Hagerman, Esq.