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November 15, 2004

Christopher J. Roehrig
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Kamuela, Hawaii 96743

Ms. Laura Hirayama
Appeal Officer, Employment Security
Appeals Referees' Office
Department of Labor and Industrial Relations
830 Punchbowl Street, Room 420
Honolulu, Hawaii 96813

Re: Disclosure of Transcript of Employment Security Appeals Hearing (RFA-P 04-040)

Dear Mr. Roehrig and Ms. Hirayama:

Mr. Roehrig has requested that the OIP advise him as to whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), the Department of Labor and Industrial Relations Employment Security Appeals Referees' Office ("DLIR") is required to disclose a transcript relating to a hearing decision after the statutory time for the filing of a judicial appeal has expired.

ISSUE PRESENTED

Does the UIPA require that the transcript of a hearing relating to a contested case appeal be provided to a party to the appeal who was present at the hearing if the matter has not been reopened or appealed to the circuit court by the DLIR or any party to the proceeding?

BRIEF ANSWER

No. Section 383-95(a), HRS, requires that information concerning unemployment compensation determinations be confidential and only made available as necessary to process a particular claim. When judicial review has not been sought within the time authorized by chapters 91 and 383, HRS, we interpret section 92F-13(4), HRS, to not require that a contested case hearing transcript be disclosed under the UIPA. Moreover, the United States Department of Labor conditions federal funding on the adoption of state laws setting forth such a confidentiality requirement. Section 92F-4, HRS, waives compliance with the UIPA when compliance would cause an agency to lose or be denied funding from the federal government.

FACTS

Mr. Roehrig advises that he represented an employer in a proceeding pursuant to chapter 383, HRS, Employment Security Law, which governs the payment of benefits to unemployed individuals. A hearing officer rendered a decision favorable to Mr. Roehrig's client on April 1, 2004. After the time for appeal of the hearing decision to the circuit court had passed,[1] Mr. Roehrig sought a copy of the transcript of the appeal from the DLIR by means of a letter dated May 12, 2004. Ms. Hirayama, the DLIR Appeals Officer, denied the record request, advising that section 383-95, HRS, provides that the information sought by Mr. Roehrig cannot be provided by law.

DISCUSSION

I. RECORDS PROTECTED FROM DISCLOSURE BY STATE LAW

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). There are five exceptions to the presumption of access. The fourth exception, at section 92F-13(4), HRS, authorizes agencies to withhold access to a government record when state law protects the record from disclosure.[2]

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[1] According to a June 21, 2004 letter from Ms. Hirayama, the appeal decision was mailed to the parties on April 1, 2004. Ms. Hirayama's letter advises that neither the claimant nor the employer sought to reopen the appeal officer's decision or filed for judicial review. According to a June 24, 2004 letter from Mr. Roehrig, he considers the April 1, 2004 decision to be final and binding.

[2] The UIPA also governs access to "personal records," defined as "any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, 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,

Section 383-95(a), HRS, provides, in relevant part:

> Except as otherwise provided in this chapter, **information obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual shall be held confidential** and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity. Any claimant (or the claimant's legal representative) shall be supplied with information from the records of the department to the extent necessary for the proper presentation of the claimant's claim in any proceeding under this chapter.

(Emphasis added.)

According to the legislative history of section 383-95(a), HRS, chapter 383, HRS, was adopted to bring Hawaii under the provisions of the federal Social Security Act and the federal "National Employment Act." H. Stand. Comm. Rep. No. 207, 19th Terr. Leg., 1937 Reg. Sess., Haw. H.J. 1133 (1937). As we read section 383-95(a), HRS, "information obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual" includes the information contained in the transcripts, as the transcript of a hearing will necessarily contain, at a minimum, testimony submitted by either an employer or an employee. Accordingly, as section 383-95(a), HRS, requires that information obtained from employers and employees in the administration of chapter 383, HRS, be held confidential except as necessary for the resolution of a claim made under the chapter, section 92F-13(4), HRS, allows the DLIR to withhold access from the public when a request is made under the UIPA.[3] Our opinion that this information is authorized to be withheld under the UIPA is limited to disclosure pursuant to chapter 92F, HRS, and not to disclosure in the context of a proceeding authorized by chapter 383, HRS, in judicial proceedings, or where considerations of federal preemption of state law are present. See In Grand Jury Subpoena, 2002 U.S. Dist. LEXIS 27114 (D. Alaska 2002) (unemployment

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such as a finger or voice print or a photograph." Haw. Rev. Stat. § 92F-3 (1993). As is the case with government records, agencies are authorized to withhold access to records "[r]equired to be withheld from the individual to whom it pertains by statute[.]" Haw. Rev. Stat. § 92F-22(5) (1993). Thus, whether analyzed as access to a "government record" or as access to a "personal record" (were a claimant or employer who is an individual to request a record), the UIPA authorizes nondisclosure where a state statute explicitly requires confidentiality. In this case, since the employer that Mr. Roehrig represents is a corporation, section 92F-22(5), HRS, is inapplicable. See Haw. Rev. Stat. § 92F-3 (1993).

[3] Additionally, section 92F-17(a), HRS, makes it a misdemeanor for an officer or employee of an agency to intentionally disclose "any confidential information explicitly described by specific confidentiality statutes with actual knowledge that disclosure is prohibited."

compensation records pertaining to an individual's claim are not protected by confidentiality statute when sought by means of a grand jury subpoena).

II. WAIVER OF COMPLIANCE WITH THE UIPA WHEN NECESSARY TO PROTECT ELIGIBILITY FOR FEDERAL FUNDING

Section 92F-4, HRS, waives compliance with the UIPA when compliance would cause an agency to lose or be denied funding, services or other assistance from the federal government.[4] Section 303(a)(1) of the Social Security Act, codified at 42 U.S.C. § 503(a)(1), conditions certification for payments by the Secretary of Labor to a State on a finding that the State's law provides for "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due[.]" Section 303(a)(8) of the Social Security Act, codified at 42 U.S.C. § 503(a)(8), conditions certification on a state law providing for "the expenditures of all moneys received pursuant to . . . this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State Law." The Department of Labor has explained in the Federal Register that it interprets sections 303(a)(1) and 303(a)(8) of the Social Security Act to require confidentiality of information collected and maintained for the administration of the unemployment compensation laws[5] and has proposed rules

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[4] Section 92F-4, HRS, was added to the UIPA in 1992. According to the legislative history, it was added to prevent State and county government agencies from losing federal funding where compliance with the UIPA would cause an agency to lose or be denied federal funding:

> your Committee notes that Chapter 92F, HRS, must also be amended to protect public agencies from being denied federal funding, services, or other assistance when complying with the Uniform Information Practices Act (UIPA).
>
> For example, educational institutions that receive federal funding may not disclose student education records under the federal Family Educational Rights and Privacy Act (FERPA) unless authorized by other provisions of federal law or by regulations adopted by the U.S. Secretary of Education. Compliance with the UIPA may seriously jeopardize federal funding for the University of Hawaii if this waiver is not provided. Moreover, other State agencies such as the Department of Health and the Department of Education may also be affected.

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).

[5] According to Unemployment Insurance Program Letter No. 34-97, June 10, 1997, available at http://workforcesecurity.doleta.gov/dmstree/uipl/uipl97/uipl_3497.htm, accessed November 5, 1994, the:

> confidentiality requirement pertains to information required from individuals and employers or employing units for the purposes of administration of the revenue and benefit provisions of

that will set forth the basic requirement of confidentiality. Employment and Training Administration, 69 Fed. Reg. at 50022 (proposed August 12, 2004) (to be codified at 20 C.F.R. pt. 603). The Federal Register explains the background of the confidentiality requirement:

> The confidentiality requirement has its origin in the beginning of the program. . . . From the early years of the program this provision has been interpreted to require the confidentiality of information collected from individuals and employers for [unemployment compensation] program administration. Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the [unemployment compensation] program, and to avoid notoriety for the program if program information were misused.

Id. at 50025.

Thus, the United States Department of Labor has unambiguously interpreted federal law to require confidentiality of unemployment compensation information.[6] Because federal funding of the unemployment compensation program is contingent on a state agency maintaining the confidentiality of that information, disclosure of the transcript is not required by the UIPA. Haw. Rev. Stat. § 92-F13(4) (1999).

> State [unemployment compensation] laws. This [Unemployment Insurance Program Letter] applies to State [unemployment compensation] agencies and the entire executive branch of State government.

Exceptions to the confidentiality requirement are also set forth in Unemployment Insurance Program Letter No. 34-97, June 10, 1997, none of which the OIP believes are applicable to the request from Mr. Roehrig.

[6] While it may seem counterintuitive that a party who is present at a hearing cannot obtain a transcript of that hearing, we believe that section 383-95(a), HRS, and the Department of Labor's interpretation of sections 303(a)(1) and 303(a)(8) of the Social Security Act, require such a conclusion.

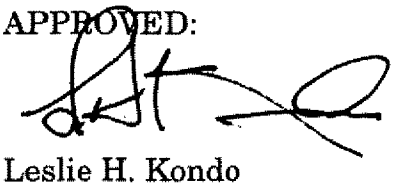
CONCLUSION

The UIPA authorizes agencies to withhold access to government records when a confidentiality statute explicitly restricts access to those records. And, when a federal statute conditions funding on compliance with its provisions, and when that statute is interpreted by the agency charged with its implementation to require confidentiality, the provisions of the UIPA are waived to the extent necessary to protect eligibility for federal funding.

Sincerely,

Susan R. Kern
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

SRK:os