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LESLIE H. KONDO
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OPINION

Requester: City Clerk
Agency: Office of the City Clerk, City and County of Honolulu
Date: June 14, 2006
Subject: Written Testimony Implicating Privacy Interests of a Third Party (U RFO-G 01-01)

REQUEST FOR OPINION

Requester seeks an opinion on whether part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") (the "UIPA"), requires the Office of the City Clerk, City and County of Honolulu (the "City Clerk"), to disclose personal information of a third party contained in written public testimony submitted to the Honolulu City Council (the "Council").

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in the March 16, 2001, letter sent to the Office of Information Practices ("OIP") by Genevieve Wong, a former city clerk, and the enclosed public testimony that was submitted to the Council and that is the subject matter of this opinion.

QUESTION PRESENTED

Whether information contained in written testimony submitted for a public meeting may be withheld from public disclosure where disclosure would constitute a clearly unwarranted invasion of the personal privacy of an individual who did not submit that testimony.

BRIEF ANSWER

Yes. Where the agency makes the determination that disclosure of information contained in public testimony would constitute a clearly unwarranted invasion of the personal privacy of a third-party individual, the UIPA grants the agency the discretion to withhold that information from public disclosure. In such instances, OIP generally advises that an agency should exercise that discretion and redact the information prior to public disclosure of the record.

FACTS

The Council and one of its subcommittees held a series of public meetings to consider the confirmation of mayoral appointee Ms. Rae Loui, P.E., as director of the Department of Design and Construction for the City and County of Honolulu. Juliana Kohl (formerly Juliana Zhang) and her husband, Keith Kohl, voiced their opposition to the appointment through oral testimony presented at, and written testimony submitted for, the Council's public hearing held on January 24, 2001.

The City Clerk has stated that the "crux of the oral and written testimony was that Mr. and Mrs. Kohl believe[d] that Ms. Loui had, in her previous capacity as Deputy to the Chair of the State Commission on Water Resource Management, recommended to the Commission Chair the hiring of [a third party], who they believe[d] was not qualified to fill the position (Hydrologist II). The Kohls' testimony also stated their belief that Ms. Loui had taken an inappropriate adverse personnel action against Mrs. Kohl."[1]

The Kohls' written testimony included a number of exhibits. The exhibits relevant here included: (1) the application for civil service position submitted by Employee X for the Hydrologist II position; (2) the Curriculum Vitae for Employee X; and (3) the State Department of Personnel Services Employment Availability Information form and Applicant Data Survey for Employee X. These exhibits contain personal information pertaining to Employee X, including his birth date, his home address and telephone number, and his social security number.[2]

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[1] Because the identity of the third party employee is irrelevant for purposes of this letter, the employee is referred to in this opinion as Employee X.

[2] The Kohls informed the City Clerk that some of the records had been obtained through a civil lawsuit that Mrs. Kohl had brought against the Department of Land and Natural Resources, Ms. Loui, and others. For purposes of this letter, OIP assumes that the personal information at issue here was not part of the public record in that suit. See OIP Op. Ltr. No. 05-16 (privacy interest is waived for information made part of trial record).

The Kohls redacted certain personal information of Employee X and resubmitted their testimony to address the City Clerk's concern that the original testimony violated the privacy of Employee X. The City Clerk nonetheless continued to be concerned that disclosure of the initial testimony submitted to and retained by the City Clerk could violate the UIPA or lead to potential liability in a civil action by Employee X for invasion of privacy. The City Clerk therefore asked OIP to opine on whether the City Clerk is prohibited from disclosing the testimony that the Kohls originally submitted.

Because the UIPA does not contain provisions that mandate the confidentiality of records[3] and OIP's jurisdiction in this instance is limited to providing an opinion concerning the City Clerk's duties under the UIPA,[4] this opinion instead addresses the issue of whether the UIPA permits the City Clerk to withhold from public disclosure information contained in written testimony submitted for a public meeting in order to protect a third party's personal privacy.

DISCUSSION

The UIPA, which governs public access to government records, provides an exception to the usual rule of disclosure for "records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]" Haw. Rev. Stat. § 92F-13(1) (1993). Disclosure would be a clearly unwarranted invasion of personal privacy where an individual has a significant privacy interest in a record that is not outweighed by the public interest in disclosure. See Haw. Rev. Stat. § 92F-14(a) (Supp. 2005). For the purpose of this balancing test, the public interest is the public interest in the disclosure of official information that sheds light on an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability. See OIP Op. Ltr. No. 91-19; OIP Op. Ltr. No. 92-17; see generally State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter, 83 Haw. 378, 399-400, 927 P.2d 386, 407-08 (1996).

Where a member of the public offers testimony to a board for or at a public meeting, OIP has found generally that the testifier thereby places that testimony into the public domain and thus has no reasonable expectation of privacy in its content. OIP Op. Ltr. No. 04-09; see Haw. Rev. Stat. § 92F-13(1). OIP has also found that because a board generally must conduct its business in a meeting open to the public and a testifier cannot reasonably expect otherwise, a board cannot withhold public testimony by arguing that disclosure would frustrate its ability to get public testimony. OIP Op. Ltr. No. 04-09; see Haw. Rev. Stat. § 92F-13(3)

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[3] See OIP Op. Ltr. No. 05-03 at 6.

[4] Haw. Rev. Stat. § 92F-42 (Supp. 2005).

(1993). OIP has accordingly opined that public testimony given orally or submitted in written form for consideration by a government board must generally be made available for public inspection and copying under the UIPA. OIP Op. Ltr. No. 04-09; see Haw. Rev. Stat. § 92F-11 (1993).

That analysis does not apply, however, where the testimony implicates the personal privacy interests of someone other than the testifier.[5] In such an instance, it is our opinion that an agency should consider the personal privacy interests of the third party individual in determining whether or not to disclose information contained in the testimony that is about that third party. See Haw. Rev. Stat. § 92F-2 (1993) (policy of conducting open government "must be tempered by a recognition of the right of the people to privacy, as embodied in" the state constitution). If disclosure "would constitute a clearly unwarranted invasion of personal privacy" of that third party, it is our opinion that the agency may, and generally should, exercise its discretion to withhold that personal information under section 92F-13(1). See OIP Op. Ltr. No. 05-03 (agency generally should exercise its discretion to withhold a record that may implicate an individual's constitutional right to privacy).

OIP has reviewed, *in camera,* copies of the exhibits to the Kohls' initial written testimony submitted for the Council's January 24 public hearing. Applying the balancing test under section 92F-13(1) to those records, it is OIP's opinion that disclosure of certain personal information of Employee X contained in the exhibits would constitute a clearly unwarranted invasion of his personal privacy.

Specifically, OIP finds that: (1) Employee X holds a significant privacy interest in his birth date, home address and telephone number, and social security number; and (2) no public interest in disclosure of this information outweighs Employee X's privacy interest because disclosure of this information in this context would shed no light on the actions or conduct of government agencies and its

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[5] OIP Opinion Letter Number 04-09 specifically addressed the issue of whether section 92F-16 would protect agency employees from liability for disclosing public testimony containing potentially defamatory statements. Section 92F-16 provides immunity from criminal or civil liability to "[a]nyone participating in good faith in the disclosure or nondisclosure of a government record." Haw. Rev. Stat. § 92F-16 (1993). In reaching the conclusion that section 92F-16 would protect employees from liability for the disclosure of potentially defamatory statements contained in submitted testimony, OIP found as a threshold matter that the statements were subject to disclosure under the UIPA because they were contained in testimony received by a board for a public meeting, which testimony should generally be made available upon request. See OIP Op. Ltr. No. 04-09 at 3-4. That opinion, however, did not consider and address the third party individual's personal privacy interests implicated by that testimony. In light of our opinion here, we hereby overrule OIP Opinion Letter Number 04-09 to the extent that it implies that a third party's personal privacy interests are not to be considered.

officials. See OIP Op. Ltr. No. 93-16 (withholding residential addresses and telephone numbers); OIP Op. Ltr. No. 01-03 (withholding social security numbers and birth dates). Accordingly, OIP believes that the City Clerk should exercise its discretion to withhold that information by redacting it prior to public disclosure of the Kohl's originally submitted testimony.[6]

CONCLUSION

Prior to disclosure of public testimony, the City Clerk may consider the privacy interests of a third party implicated in the testimony and may exercise its discretion to withhold portions of the testimony where the disclosure would be a clearly unwarranted invasion of the personal privacy of the third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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[6] Although the employee has not been identified in this letter because his identity is irrelevant to the issue presented here, the City Clerk should not redact the name of the employee when disclosing the testimony. A successful government employee candidate for promotion has no privacy interest in, among other things, the fact of that employment and his or her qualification for the position obtained. See OIP Op. Ltr. No. 94-8 (recognizing diminished privacy interest of government officials and employment information required to be disclosed about individual government employees under section 92F-12(a)(14)).