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December 30, 1997

Mr. Harry T. Honda
Executive Director
Plumbing & Mechanical Contractors Association of Hawaii
1314 S. King Street, Suite 961
Honolulu, Hawaii

Dear Mr. Honda:

Re: Access to Contractors License Application Experience Certificates Prior to the Contractors License Board Approval of the Application

This is in reply to your July 19, 1994 letter to the Office of Information Practices ("OIP") requesting an opinion regarding the disclosure of an application for a contractors license.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Commerce and Consumer Affairs ("DCCA") must make available for public inspection and copying the Experience Certificates contained in an application for a contractors license ("Experience Certificates") prior to the Contractors License Board ("CLB") approval of the application.

BRIEF ANSWER

No. Section 92F-14(b)(7), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in "[i]nformation compiled as part of an inquiry into an individual's fitness to be granted...a license." Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 1996). The OIP finds that Experience Certificates submitted with an application for a contractors license fall under this category of information. Under the UIPA balancing test, the public interest to be balanced against an individual's privacy interest is the interest

in allowing the public to review the government's actions. Here, prior to board action on an application, no government action has occurred, and therefore, the OIP finds that the public interest in disclosure does not outweigh the individual's significant privacy interest in the Experience Certificates. Thus, pursuant to section 92F-13(1), Hawaii Revised Statutes, disclosure would constitute a clearly unwarranted invasion of personal privacy, and the Experience Certificates are exempt from disclosure required under the UIPA. Haw. Rev. Stat. § 92F-13(1) (1993); Haw. Rev. Stat. § 92F-14 (Supp. 1996).

FACTS

In your July 19, 1994 letter to the OIP, you stated that the Plumbing & Mechanical Contractors Association of Hawaii previously asked the Executive Officer for the CLB for access to the application form and supporting documents of pending license applicants in order to verify the applicants' qualifications and experience. The Executive Officer denied the request and stated that the application form and supporting documents were only for review by the CLB and were not open to public inspection.

In support of your request for access to a pending application, you enclosed a copy of the CLB's rule, section 16-77-44, Hawaii Administrative Rules, which provides for the posting of the names of applicants for licensure prior to determination by the CLB.[1] We understand that your organization is concerned about the public's ability to file a written protest on an application when they do not have the ability to inspect and verify a pending applicant's qualifications and experience.

On November 19, 1997, you narrowed the request that you made in your July, 1994 letter and indicated that your organization is interested only in access to the Experience Certificates. Because the purpose of your request

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[1]Section 16-77-14, Hawaii Administrative Rules, provides:

> Posting of information in license application. When the applicant has filed a complete application, the name and address of the applicant, together with the names and addresses and official capacity of the personnel of the applicant shall be publicly posted, as part of the board's investigation under section 444-16, HRS, for not less than fourteen days. No license shall be issued until the expiration of the posting period.

is to be able to appropriately comment on the applicants' qualifications for licensure, you also indicated that your organization wanted access to the Experience Certificates only prior to the CLB's determination on licensure.

The CLB issues three types of licenses: (1) sole proprietor; (2) entities (corporation, partnership, joint venture, LLC or LLP); and (3) responsible managing employee ("RME"). A sole proprietor is required to submit an application, a fee, a trade name registration, experience certificates, a financial statement, a credit report, and a tax clearance. An entity must submit an application, a fee, a financial statement, credit reports for each officer/partner/manager/member and RME, a tax clearance, a trade name registration, an RME appointment, and entity registration. An RME application consists of an application, a fee, experience certificates, and a credit report.

Pursuant to a conversation on October 20, 1997 with Charlene Tamanaha, the present Executive Officer of the CLB, the OIP understands that the disclosure practice of the CLB remains consistent with your experience in which you were denied access to pending applications. Generally, the CLB treats license applications as confidential pending board approval. The only exception to this is the CLB's practice of posting and making publicly available the name and address of an applicant, and the names and addresses and official capacity of the personnel of an applicant, pursuant to the laws governing the CLB. See Haw. Admin. Rule § 16-77-14; Haw. Rev. Stat. §§ 444-10 & 444-16 (1993).

On November 5, 1997, Ms. Tamanaha clarified for the OIP that the CLB reviews the application and supporting documents, including the Experience Certificates. Based on that review, the CLB approves qualifying applicants subject to their passing a licensing examination and meeting insurance requirements.

DISCUSSION

I. Privacy Interest

The OIP has addressed the issue of access to professional and vocational license applications pending DCCA approval in prior opinions. See OIP Op. Ltr. No. 91-1 (Feb. 15, 1991); OIP Op. Ltr. No. 91-11 (July 30,

1991) (clarifying OIP Op. Ltr. No. 91-1).[2] In OIP Opinion Letter No. 91-1, the OIP addressed questions of public access to massage therapist license applications. One of the questions addressed was the following:

> Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the DCCA must make available for public inspection and copying a massage therapist license application before a license has been granted to the applicant.

OIP Op. Ltr. No. 91-1 at 1 (Feb. 15, 1991). Citing Section 92F-14(b)(7), Hawaii Revised Statutes, the OIP noted that an individual has a significant privacy interest in:

> (7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:
>
> (A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;
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> (B) Information on the current place of employment and required insurance coverages of licensees; and

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[2]After issuing OIP Opinion Letter No. 91-1(Feb. 15, 1991), the OIP discovered that section 452-9, Hawaii Revised Statutes, in the chapter governing the Board of Massage, contained a unique provision which made all board records, including applications, public, and issued OIP Opinion Letter No. 91-11 (July 30, 1991) to clarify OIP Opinion Letter No. 91-1. See OIP Op. Ltr. No. 91-11 (July 30, 1991). Although section 452-9, Hawaii Revised Statutes, as written at the time, required the OIP to find that all applications for the Board of Massage were then public, we noted that:

> . . . OIP Opinion Letter No. 91-1 can still be referred to for guidance in applying the relevant UIPA exceptions to information contained in those vocational or professional license applications for which there is no specific statute expressly mandating, or prohibiting, public access. Apparently, the license applications maintained by the DCCA for a majority of the vocations and professions that it regulates, other than massage therapy, are not expressly made public or confidential by a specific statute.

OIP Op. Ltr. No. 91-11 at 4, n.1 (July 30, 1991).

(C) The record of complaints including all dispositions.

OIP Op. Ltr. No. 91-1 at 7 (Feb. 15, 1991), citing Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 1990). Because the DCCA determines a massage therapist license applicant's eligibility to take the license exam based on information in the application for licensure, the OIP found that the application constituted information in which the applicant had a significant privacy interest under section 92F-14(b)(7), Hawaii Revised Statutes. OIP Op. Ltr. No. 91-1 at 7 (Feb. 15, 1991).

As the information contained in the Experience Certificates pertains to individuals, the concept of a privacy interest embodied by section 92F-13(1), Hawaii Revised Statutes, and the analysis used in OIP Opinion Letter No. 91-1 apply. See, e.g., OIP Op. Ltrs. No. 93-20 at 4-5 (Oct. 21, 1993) (the UIPA only recognizes the privacy interest of the individual); 89-5 at 7-8 (Nov. 20, 1989) (only individuals have privacy interests). The Experience Certificates sought by your association are used by the CLB to determine an applicant's eligibility for licensure. The data on these documents therefore constitutes "information compiled as part of an inquiry into an individual's fitness to be granted a license" in which an individual has a significant privacy interest. Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 1996). See OIP Op. Ltr. No. 91-1 (Feb. 15, 1991).

II. Public Interest

In balancing the privacy right of an individual against the public interest in disclosure under the UIPA, the public interest to be considered is that which sheds light upon the workings of government. See OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991); OIP Op. Ltr. No. 90-10 at 5 (Feb. 26, 1990); OIP Op. Ltr. No. 95-24 at 11-13 (Oct. 6, 1995); OIP Op. Ltr. No. 95-14 at 11 (May 8, 1995); OIP Op. Ltr. No. 95-10 at 7-8 (May 4, 1995). In seeking access to the Experience Certificates, your organization raises a different type of public interest.

In your July 19, 1994 letter, you cite the CLB rule that requires, as part of the CLB's investigation of a license application, the posting of the name and address of the applicant, together with the names and addresses and official capacity of the applicant's personnel. Haw. Admin. Rule § 16-77-14. See also Haw. Rev. Stat. §§ 444-10 and 444-16 (1993). You note that it is difficult to comment on a pending application when you do not have

access to the application. As you suggest, the public arguably would benefit from the release of information on the qualifications and experience of pending applicants as it would enable people and organizations such as the Plumbing & Mechanical Contractors Association of Hawaii to provide helpful feedback to the CLB on an applicant's qualification for licensure.[3] In contrast with the public interest under the UIPA of promoting government accessibility, the public interest which you raise is one of maintaining the quality of the contractors awarded licensure. This interest is overseen by the CLB, governed by specific statutes and rules. See Haw. Rev. Stat. chapter 444 (1993 and Supp. 1996); Haw. Admin. Rules title 16, chapter 77. As the interest you cite is one outside of the parameters of the UIPA, it may be more properly addressed through legislative review and amendment of the statutes specifically directed at the CLB, rather than through an OIP opinion letter.

As stated earlier, under the UIPA, the public interest to be balanced against an individual's privacy interest is that in reviewing the government's actions. See, e.g., OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991). In OIP Opinion Letter No. 91-1, the OIP stated "the public interest behind the UIPA is based upon the principle that the 'conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.'" OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991), citing Haw. Rev. Stat. § 92F-2 (Supp. 1990). See also OIP Op. Ltr. No. 90-10 at 5 (Feb. 26, 1990). With this understanding of the public interest to be pursued under the UIPA, the OIP found ". . . when the DCCA has not yet issued a license, disclosure of the Application would not further the public interest behind the UIPA because it sheds no light upon the conduct of the DCCA or 'what the government is up to.'" OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991) (emphasis added). The OIP then determined that because the public interest in disclosure did not outweigh the individual applicant's significant privacy interest, disclosure would have constituted a clearly unwarranted invasion of personal privacy, and therefore, the massage therapist application was exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes. OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991).

Here, as determined in OIP Opinion Letter No. 91-1, where a licensing

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[3]Presently, the posting of the applicants' names and other information provides the public with notice that the CLB is considering the applicants for licensure. Although the public's comments are made without knowing the experience or qualifications claimed by an applicant on the Experience Certificates, the public is able to provide input regarding an applicant's qualification for licensure to the CLB.

body, such as the CLB, has not yet acted upon an application, there is no government action to review, and thus, little public interest in disclosure of the private data in the application. See OIP Op. Ltr. No. 91-1 at 8 (Feb. 15, 1991), citing Haw. Rev. Stat. § 92F-2 (Supp. 1990). See also OIP Op. Ltr. No. 90-10 at 5 (Feb. 26, 1990) (where disclosure of information would say little about the conduct of an agency, public interest in disclosure is not significant and does not outweigh an individual's privacy interest); OIP Op. Ltr. No. 91-8 at 4 (June 24, 1991) (before the Governor's nomination, individually identifiable information regarding an applicant for appointment to a board or commission is confidential). Therefore, in view of the applicant's significant privacy interest, consistent with OIP Opinion Letter No. 91-1 (Feb. 15, 1991), the OIP must find that, other than the information authorized to be released by section 16-77-14, Hawaii Administrative Rules, and section 444-16, Hawaii Revised Statutes, the Experience Certificates submitted with an application for a contractors license are exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes. Haw. Rev. Stat. Section 92F-13(1) (1993); OIP Op. Ltr. No. 91-1 (Feb. 15, 1991).

In reaching this determination, the OIP notes that the Legislature, by its actions, has indicated the importance it places on the individuals' privacy interest. In enacting the laws affecting the disclosure of information contained in a contractors license application, the Legislature could have provided but did not provide for the release of information regarding an applicant's experience. The Legislature limited disclosure under section 444-16, Hawaii Revised Statutes, to name and address information only. Haw. Rev. Stat. § 444-16 (1993). Furthermore, in enacting section 92F-14(b)(7), Hawaii Revised Statutes, with limited exceptions, the Legislature specifically provided that an applicant has a significant privacy interest in information regarding the applicant's fitness for licensure, and thus, acknowledged the need for a higher level of public interest to be demonstrated before the information could be disclosed. Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 1996).

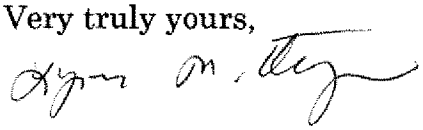
Likewise, it should be noted that the present circumstances involve licensure of a private individual seeking ultimate employment in the private sector. Although the OIP's opinions on information regarding applicants for a government position are important to the OIP's analysis here, the privacy interest of government applicants may be diminished, depending on the position being filled and the appointment

process, while the public interest in the background of such individuals is heightened. See Nakano v. Matayoshi, 68 Haw. 140 (1985) (government official's privacy interest in his financial affairs is not protected to the same extent as that of other citizens); OIP Op. Ltr. No. 89-2 (Oct. 27, 1989) (while holding that the information regarding only a successful candidate for special master for the State corrections system should be disclosed, the OIP acknowledged that certain high level governmental positions require legislative scrutiny and evaluation of the final candidate during public hearings). Therefore, when applying the balancing test for the UIPA privacy exception, it is significant that the Experience Certificates do not involve the appointment of a high ranking government official, which, consistent with the OIP's prior opinions, would involve the consideration of factors not applicable here.

CONCLUSION

Prior to a determination by the CLB, there is no government action for the public to review and therefore, no public interest in disclosure of the Experience Certificates under the UIPA. Thus, given the individuals' significant privacy interest in the information contained in their Experience Certificates, the Experience Certificates submitted as part of an application for a contractors license are exempt from disclosure prior to CLB action.

Very truly yours,



Lynn M. Otaguro
Staff Attorney

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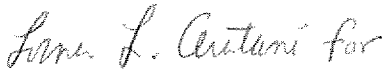

Moya T. Davenport Gray
Director

LMO:sc
Attachments
cc: Ms. Charlene Tamanaha