Op. Ltr. 99-03 Vessel Registration Information

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

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June 1, 1999

Mr. Stephen L. Thompson
Oahu District Manager
State of Hawaii
Department of Land and Natural Resources
Division of Boating and Ocean Recreation
333 Queen Street, Suite 300
Honolulu, Hawaii, 96813

Dear Mr. Thompson:

Re: Vessel Registration Information

This letter is in response to your request for an opinion on whether information collected on the Application for Vessel Registration and Certification Number for Undocumented Vessel Used Principally in Hawaii ("vessel registration form") is public.

ISSUES PRESENTED

1. Whether any information collected on the Department of Land and Natural Resources, Division of Boating and Ocean Recreation's ("DLNR") vessel registration form (a blank copy is attached as "Exhibit A") is protected from public disclosure because disclosure would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

2. Whether the DLNR may require record requesters to make their requests in writing.

3. Whether the DLNR may require record requesters to provide the following information prior to disclosure: (1) whether the vessel owner knows of the

request, (2) the intended use of the information being requested, (3) an affirmation that the requested information will not be used to compile a list of individuals for the purposes of commercial solicitation, and (4) an assertion that the requester shall assume full responsibility and hold the State harmless in any civil suit arising from subsequent misuse of the information.

4. Whether the DLNR may discontinue providing paper copies of the vessel registration form after completion of its new database which will store the information collected on the vessel registration forms electronically.

BRIEF ANSWER

1. Yes. Home addresses, home telephone numbers, dates of birth, and citizenship status all constitute information protected from disclosure under the UIPA because disclosure would amount to a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. Vessel registration forms should be disclosed after segregation of these types of information. In addition, if an applicant's registration is still pending, or if registration has been denied, the applicant's name should also be segregated.

2. No. Agencies cannot require record requesters to make requests in writing because there is no requirement in the UIPA that record requests be in writing. However, the OIP's administrative rules, which became effective on February 26, 1999, set forth procedures for formal record requests, which should be made in writing to the agency maintaining the requested record. Informal requests for government records made pursuant to the OIP's rules need not be in writing.

3. No. The UIPA generally does not allow government agencies to condition the disclosure of public information upon the provision of information by the requester. Agencies may not require record requesters to provide a statement of the intended use of the information, nor are agencies allowed to regulate use of the information by the requester after disclosure.

4. No. The DLNR plans to continue to maintain paper copies of vessel registration forms, even after completion of its new database. When a request is made to inspect the paper copy, a paper copy should be disclosed after segregation of all nonpublic information.

FACTS

Pursuant to a financial agreement between the federal Department of Transportation/United States Coast Guard and the State of Hawaii, the State receives federal funding based, in part, on the requirement that it administer an approved vessel numbering system. Financial Agreement Between Department of Transportation/United States Coast Guard and the State of Hawaii Agreement Number 18.01.15.

Chapter 200, Hawaii Revised Statutes, titled "Ocean Recreation and Coastal Areas Programs," gives the Board of Land and Natural Resources primary responsibility for administering ocean recreation and coastal areas programs. Haw. Rev. Stat. § 200-2 (Supp. 1998). In section 200-21, Hawaii Revised Statutes, the Legislature set forth the purposes behind this area of the law:

> **§200-21 Declaration of policy.** The legislature hereby finds, determines, and declares that this part is necessary to promote and attain:
>
> (1) The full use and enjoyment of the waters of the State;
>
> (2) The safety of persons and the protection of property as related to the use of the waters of the State;
>
> (3) A reasonable uniformity of laws and rules regarding the use of the waters of the State, and
>
> (4) Conformity with, and implementation of, federal laws and requirements.

The Legislature required every undocumented vessel[1] to be registered and numbered before its use or operation on or in the water on an annual basis with exceptions for four types of vessels, in accordance with the DLNR's rules. Haw. Rev. Stat. §200-31 (1993). The DLNR is authorized, under section 200-32, Hawaii Revised Statutes, to charge fees for registration, renewal, transfer, and

[1]An "undocumented vessel" means "any vessel which does not have and is not required to have a valid marine document as a vessel of the United States." Haw. Rev. Stat. § 200-23 (Supp. 1998).

modification of certificates, penalties, and other charges pertaining to vessel registration.

Pursuant to statutory mandate, the DLNR adopted extensive administrative rules to implement the policy and purpose of part I of chapter 200, Hawaii Revised Statutes. The language of the DLNR's rules at section 13-240-1, Hawaii Administrative Rules, entitled Purpose and scope, is substantially similar to section 200-21, Hawaii Revised Statutes, cited above. These rules also include provisions for classifying vessels into appropriate categories and classes, and for "[t]he registration and numbering of vessels." Haw. Rev. Stat. § 200-24 (1993).

Chapter 241 of the Hawaii Administrative Rules ("Rules"), governs certain procedures of the DLNR's Division of Boating and Ocean Recreation. According to the Rules, the Division of Boating and Ocean Recreation has jurisdiction over recreational boating and related vessel activities. Chapter 241, Hawaii Administrative Rules, Historical Note. The Rules prohibit the operation of an undocumented vessel unless numbered in accordance with this chapter, and require, with exceptions, that undocumented vessels within the State be numbered. Section 13-241-1, Hawaii Administrative Rules.

The DLNR also has authority to grant or deny applications for a "certificate of number." Section 13-241-6, Hawaii Administrative Rules. Once a vessel registration application has been approved, the applicant receives a certificate of number. The number is affixed to the outside of the vessel. The certificate of number must be maintained pocket size and water resistant, and shall be available for examination on the vessel whenever the vessel is in operation. Section 13-241-8, Hawaii Administrative Rules.

According to your letter dated August 30, 1995, it has been the DLNR's practice to make vessel registration forms public in their entirety. The DLNR Boating Regulation Officer, Carol She', confirmed in a telephone conversation of July 21, 1998, that this practice of making vessel registration forms public likely began in 1992, when the DLNR assumed jurisdiction of ocean recreation and coastal areas from the Department of Transportation ("DOT"). However, Ms. She' did not know whether the DOT also used a vessel registration form, and if so, whether that

form was public. A copy of the DLNR's vessel registration form provided for the OIP's review states "THIS IS A PUBLIC DOCUMENT" at the top right side of the page. (See "Exhibit A").

According to an October 15, 1997, letter from Ms. She', the DLNR has received complaints from vessel owners regarding its policy of making vessel registration forms public in their entirety. Ms. She' stated that the DLNR is concerned with protecting privacy interests of vessel owners. Ms. She''s letter also stated that the DLNR would like to ask for the following information from requesters prior to disclosure of vessel registration forms, in order to protect vessel owners from unlawful use by others of information about them: (1) whether the vessel owner knows of the request, (2) the intended use of the information being requested, (3) an assertion that the requested information will not be used to compile a list of individuals for the purposes of commercial solicitation, and (4) an assertion that the requester shall assume full responsibility and hold the State harmless in any civil suit arising from subsequent misuse of the information.

Ms. She' informed the OIP that the DLNR is working on a new database that will maintain the information contained on vessel registration forms. The database will allow the Coast Guard access to information about vessel owners. Once this database is completed, the DLNR hopes it will no longer have to make paper copies of actual vessel registration forms available, but only to generate requested information from the database. Data will still be collected on paper vessel registration forms, and then be transferred to the database. The DLNR will continue to maintain the paper copies of vessel registration forms after the information is transferred to the database.

The DLNR does not intend at this time to have a public computer terminal. Instead, when a request is made for access to vessel registration application information, the DLNR will provide a printout with protected information segregated. Ms. She' stated she is unaware of any State or federal statute protecting the information collected on vessel registration forms from public disclosure, and that other than the UIPA's privacy exception, the DLNR did not assert any exceptions under the UIPA to disclosure of information collected on the vessel registration forms.

DISCUSSION

I. INTRODUCTION

A "government record" means "information maintained by an agency in written, auditory, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). 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 this general rule of disclosure under the UIPA. Section 92F-13, Hawaii Revised Statutes, provides that government agencies need not disclose:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Haw. Rev. Stat. § 92F-13 (1993).

II. DLNR'S TREATMENT OF INFORMATION CONTAINED ON VESSEL REGISTRATION FORMS VERSUS HAWAII LAW

The DLNR has treated vessel registration forms as public in their entirety since the creation of the Division of Boating and Ocean Recreation in 1992, including information such as home addresses, home telephone numbers, dates of birth, citizenship status, and financial information about individuals. [2]

Chapter 200, Hawaii Revised Statutes, is silent as to the public nature of vessel registration information, as nothing therein specifically makes information collected on vessel registration forms either public or not public. Further, a review of the legislative history of Chapter 200, Hawaii Revised Statutes, shows no specific legislative intent that any of the information collected on vessel registration forms be public or not public. Therefore, section 92F-13(4), Hawaii Revised Statutes, which authorizes nondisclosure of records that are protected from disclosure by state or federal law or court order does not apply here.

However, the DLNR Rules do provide that DLNR records made or kept pursuant to Chapter 241, Hawaii Administrative Rules, "shall be public records." Section 13-241-23, Hawaii Administrative Rules. It should be noted however, that when an administrative rule conflicts with a statute, the statute is the ruling body of law. See OIP Op. Ltr. No. 93-7 at 5 (July 27, 1993) ("[i]t is axiomatic that an agency rule or policy that restricts or conflicts with a legislative enactment is invalid." (citing Agsalud v. Blalack, 67 Haw. 588, 591 (1985); U.S. Nat. Trans. Safety Bd, 888 F.2d 767 (11th Cir. 1989); Calif. Ass'n of Psychology Providers v. Bank, 793 P.2d 2 (cal. 1990)). Therefore, any disclosure or non-disclosure provision

[2]The Division of Boating and Ocean Recreation began making vessel registration forms public in 1992, after the UIPA's enactment. The UIPA's legislative history states that the UIPA was not intended to make information nonpublic when it was public prior to the UIPA's enactment in 1988, even if that information may fall into one of the UIPA's exceptions to disclosure. S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. R. Conf. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). Thus, had the DLNR made vessel registration forms public prior to the UIPA's enactment in 1988, the OIP may have been constrained to opine in this case that based on legislative history, vessel registration forms must continue to be public in their entirety. See OIP Op. Ltrs. No. 93-4 (June 3, 1993); No. 92-5 (June 16, 1992); No. 91-17 (Oct. 7, 1991).

within Chapter 241, Hawaii Administrative Rules, is void insofar as it conflicts with the UIPA or any other statute.[3]

Vessel registration forms contain information that carries significant privacy interests, so the OIP will apply the balancing test set forth in section 92F-14, Hawaii Revised Statutes. This test provides that if the public interest in disclosure outweighs the privacy interests therein, disclosure does not constitute a clearly unwarranted invasion of personal privacy.

III. BALANCING PRIVACY INTERESTS IN NON-DISCLOSURE AGAINST THE PUBLIC INTEREST IN DISCLOSURE

The UIPA provides that government records need not be disclosed when disclosure would constitute a clearly unwarranted invasion of personal privacy.[4] Haw. Rev. Stat. § 92F-13(1) (1993). If the public interest in disclosure outweighs any privacy interests in a government record, disclosure would not constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. § 92F-14(a) (Supp. 1998). When balancing the privacy right of an individual against the public interest in disclosure, the public interest to be considered is that which sheds light upon the workings of government. OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993). The OIP reached this conclusion by looking at:

> two basic policies served by the UIPA, which are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through

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[3]An exception to this rule of statutory construction is at section 92F-12(b)(6), Hawaii Revised Statutes, which provides that information in motor vehicle registration files shall be disclosed if the requester has a "legitimate reason as determined by rules." Haw. Rev. Stat. § 92F-12(b)(6) (Supp. 1997). The "rules" referred to in section 92F-12(b)(6), Hawaii Revised Statutes, are the Department of Transportation ("DOT") Administrative Rules pertaining to motor vehicle registration ("DOT Rules"). OIP Op. Ltr. No. 91-13 (Aug. 20, 1991). The DOT Rules are not applicable to this discussion.

[4]Only natural persons have cognizable privacy interests under the UIPA's privacy exception. Haw. Rev. Stat. § 92F-3 (1993). Corporations, partnerships, business trusts, or associations have no personal privacy interest in government records maintained by agencies. See OIP Op. Ltrs No. 93-1 (Apr. 8, 1993); No. 93-5 (June 7, 1993); and No. 94-20 (Oct. 20, 1994). Therefore, a vessel owner that is not a natural person has no privacy interest in information collected on a vessel registration form pertaining to that entity. The OIP Opinion Letter Number 98-2 (Apr. 24, 1998) discusses protected interests of corporate entities.

> a general policy of access to government records." Haw. Rev. Stat. § 92F-2 [1993]. Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 [1993].

OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993).

A. Names of Applicants for Registration of Undocumented Vessels

The UIPA requires that rosters of persons holding licenses or permits granted by an agency, including name, business address, type of license held, and status of the license are public. Haw. Rev. Stat. § 92F-12(a)(13) (Supp. 1998). Based on section 92F-12(a)(13), Hawaii Revised Statutes, the OIP has issued opinions on the public nature of names of licensees or permit holders and names of applicants for licenses or permits. See OIP Op. Ltrs. No. 90-28 at 4 (Aug. 23, 1990) (names of licensed contractors are public); No. 91-1 at 8 (Feb. 15, 1991) (while protected prior to granting of a license, names of licensed massage therapists are public after a license is granted).

The OIP has also opined that individuals who submit themselves to regulation by government are similarly situated to licensees or permit holders. See OIP Op. Ltr. No. 92-18 at 5 (Sept. 16, 1992) (certification as pesticide operator serves the same purpose as a license or permit for regulated activity, so the "clearly unwarranted invasion of personal privacy" exception to disclosure does not apply to names of certified pesticide operators).

In this case, vessel registration applicants are not applying for licenses or permits under section 92F-12(a)(13), Hawaii Revised Statutes. However, vessel registration applicants are similarly situated to persons who apply for certification as pesticide operators because, although they do not receive a license or a permit as described in section 92F-12(a)(13), Hawaii Revised Statutes, they do submit themselves to regulation by government. Therefore, as with certified pesticide operators whose names are public, once a vessel has been registered, the name of the vessel applicant is public.

In addition, the OIP has opined that while a license or permit application is pending, disclosure would not shed light on the workings of government. OIP Op.

Ltr. No. 91-1 at 8 (Feb. 15, 1991). If the application has been denied, the applicant's significant privacy interest in this embarrassing information linked to his or her name outweighs the public interest in disclosure. Id. at 8. Therefore, like any other applicant who intends to subject him or herself to regulation by government, if an applicant for registration of an undocumented vessel has been rejected, or if the application is pending, the applicant's significant privacy interest in the information on the application outweighs the public interest in disclosure, and the name should be segregated.

B. Home Addresses, Home Telephone Numbers, and Dates of Birth of Individuals

Based on prior OIP Opinion Letters, the OIP finds that the DLNR is required under the UIPA to segregate certain information prior to disclosure of vessel registration forms that have been granted. When applying the balancing test to home addresses,[5] home telephone numbers, and dates of birth in the past, the OIP opined that these types of information should not be disclosed under ordinary circumstances because they carry significant privacy interests that outweigh any public interest in disclosure. See OIP Op. Ltrs. No. 95-2 (Jan. 19, 1995) (home address and telephone number must be segregated prior to disclosure of background information on unsuccessful applicants on certified list of eligibles based on prior OIP opinion letters, and Core v. United States Postal Service, 730 F.2d 946 (4th Cir. 1984), because disclosure could lead to actual identification of the individuals about whom the information pertains); No. 92-22 (Nov. 18, 1992) (based on prior OIP opinion letters, and citing as examples Hemenway v. Hughes, 601 F. Supp. 1002 (D.D.C. 1985), and CBS, Inc. v. Partee, 556 N.E. 2d 648 (Ill. App. Ct. 1990), the OIP reaffirmed that an individual's birthdate is protected from disclosure under section 92F-13(1), Hawaii Revised Statutes, as disclosure would not reveal anything about the conduct and actions of government agencies and their officials).

[5]If it can be determined that "MAILING ADDRESS" and "STREET ADDRESS" designations on the vessel registration form are business and not home addresses, they should be disclosed. If such a determination cannot be made, the address should not be disclosed. See OIP Op. Ltr. No. 91-19 (Oct. 18, 1991) (privacy interests in P.O. boxes are minimal because they do not reveal the location of a person's residence, and individuals do not have significant privacy interests in their business address, but when there is no way to distinguish whether a mailing address is a home address, the OIP concluded mailing addresses contained in the Hawaiian Home Lands Lessee data file must be kept confidential).

Similarly here, any public interest in disclosure of home addresses, home telephone numbers, and dates of birth of vessel owners is minimal because disclosure would not shed light upon the workings of government. The balancing test reveals that the public interest in disclosure does not outweigh individual privacy interests, and therefore, home addresses, home telephone numbers, and dates of birth should be segregated prior to disclosure.

C. Financial Information

1. Information Describing an Individual's Assets

Prior to the enactment of the UIPA, the Hawaii Supreme Court noted that "the people of Hawaii have a legitimate expectation of privacy where their personal financial affairs are concerned." Nakano v. Matayoshi, 68 Haw. 140, 148 (1985). When the UIPA was enacted, the Legislature provided a non-exhaustive list of information that carries a significant privacy interest, including "information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." Haw. Rev. Stat. § 92F-14(b)(6) (Supp. 1998). The vessel registration forms contain information that describes an individual's assets, namely, a vessel.

In 1990, the OIP rendered an opinion on firearm registration forms. In that opinion, the OIP noted that a firearm could be considered an "asset" for purposes of section 92F-14(b)(6), Hawaii Revised Statutes, but that any privacy interest in asset information collected on a firearm registration form was outweighed by the public interest in disclosure. OIP Op. Ltr. No. 90-25 (July 12, 1990). In the facts of OIP Opinion Letter Number 90-25, firearm registration information included not only the fact that a person owned a firearm, but also detailed information about that firearm, such as make and model, factory serial number, caliber or gauge, type, where acquired, and prior registrant's name. The OIP opined that the public needed to know the names of registered firearms owners in order to monitor how the police departments were doing the job of registering firearms, and of performing required investigations into ownership qualifications.[6] OIP Op. Ltr. No. 90-25 at 11

[6]The OIP noted in the OIP Opinion Letter Number 95-18 (July 28, 1995), that a subsequent legislative enactment changed the nature of firearm registration information. Section 134-3, Hawaii Revised Statutes, was amended to read "[a]ll registration data that would identify the individual registering the firearm by name or address shall be confidential." Haw. Rev. Stat. § 134-3 (Supp. 1998).

(July 12, 1990). In addition, the OIP opined that the public needed to know the description of the firearm because a "permit to acquire" issued by the police department only applied to a specific firearm. Id. at 12.

Following the rationale of the OIP Opinion Letter Number 90-25, like a firearm, a vessel could be considered an "asset" under section 92F-14(b)(6), Hawaii Revised Statutes, and thus, an individual would have a significant privacy interest in information about vessel ownership. Unlike firearm registration information, there is no statutory protection provided to vessel registration information. Therefore, to determine whether disclosure of the fact that a person owns a vessel, as well as information describing the vessel, constitutes a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes, the public interest in disclosure must be balanced against any privacy interests therein. As stated above, the public interest to be considered is whether disclosure would shed light on the workings of government. OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1997).

The vessel registration form collects information describing vessels, including type of radio communications on board, type of vessel (i.e.: cabin motorboat, sailing vessel, thrill craft, etc.), number of hulls, colors, name, year built, year model, vessel length, hull material, engine, hull manufacturer's name, country where hull built, hull identification number, types of fuel, propulsion (i.e.: outboard, inboard, sail only, etc.), and principal use. This all constitutes information describing an asset, and therefore carries a significant privacy interest under section 92F-14(b)(6), Hawaii Revised Statutes.

The OIP believes that although an individual has a significant privacy interest in registration information revealing ownership of a vessel and describing the vessel, the public interest in disclosure of this information outweighs this privacy interest. The Legislature set forth, in section 200-21, Hawaii Revised Statutes (cited on page 3 of this opinion), important public safety policies underlying boating laws in Hawaii. The government function of overseeing vessel registration implements these policies. Information describing the vessel is essential to the process of vessel registration. For purposes of vessel examination, this information is required to be on the certificate of number and aboard the subject vessel at all times. Section 13-241-8 Hawaii Administrative Rules (1994).

In this regard, the vessel registration process is similar to the issuance of licenses and permits.[7]

In view of the public safety policies mandated by the Legislature and implemented by the DLNR's vessel registration processes set forth in chapter 200, Hawaii Revised Statutes, and DLNR Rules, the public has an interest in determining whether the DLNR's regulatory function of overseeing vessel registration is being properly performed. Specifically, there is a public interest in whether a vessel's certificate of number was properly granted and whether the waters are safe. Thus, the public has a great interest in information about vessel regulation, and the vessels receiving a certificate of number. Information describing the vessel collected on the vessel registration form is essential to the registration process, and is required by the DLNR Rules to be set forth on the certificate of number aboard each vessel while in operation at all times for purposes of making it available for examination. Section 13-241-8, Hawaii Administrative Rules (1994). The OIP therefore concludes that the public interest in vessel ownership and vessel description information outweighs any privacy interests therein, and the information is public.

2. Lien Information

Sections (13) through (16a) on the vessel registration form refer to lien information. This may constitute financial information describing an individual's liabilities which carries a significant privacy interest under section 92F-14(b)(6), Hawaii Revised Statutes. However, liens are generally a matter of public knowledge. For example, Mechanic's and Materialman's liens[8] are filed with the circuit court and published under section 507-43(f), Hawaii Revised Statutes. Notices of Internal Revenue and State tax liens are a matter of public record. Haw.

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[7]The Legislature has already recognized in section 92F-12(a)(13), Hawaii Revised Statutes, that licenses and permits must be disclosed notwithstanding exceptions such as for personal privacy. See also H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, S.J. 669, 670 ("exceptions such as for personal privacy" are not applicable to records listed in section 92F-12, Hawaii Revised Statutes").

[8]Mechanic's lien statutes "provide a manner in which an artisan or materialman can recover amounts due him from persons benefiting from his services even when there was no direct contractual relationship between them." Shelton Eng'r v. Haw'n Pac. Indus., 51 Haw. 242, 247 (1969).

Rev. Stat. § 286-47(b) (Supp. 1998). Security interests[9] are filed at the Bureau of Conveyances, and are enforceable against purchasers and creditors. Haw. Rev. Stat. §§ 490:9-401, 490:9-201 (1993). There are other types of liens including equitable liens[10], judgment liens[11], mortgages, and other liens which may or may not attach to vessels.

The UIPA requires that government records be disclosed when a federal or State law expressly authorizes disclosure to the requester. Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1998). The OIP was unable to find a specific statutory provision applying to liens on vessels. The only Hawaii case law in this area dates back to maritime liens[12] during the late 1800s and early 1900s, and the OIP found it inapplicable as the cases were archaic and did not address the issues raised here. However, in light of the above-mentioned statutory mandates that different types of liens be public, the public policy favoring the public nature of liens to protect creditors and potential purchasers, and the fact that several different types of liens discussed above could attach to a vessel, lien information on vessel registration

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[9]A "security interest" is "an interest in personal property or fixtures which secures payment or performance of an obligation." Haw. Rev. Stat. § 990:1-201(37) (1993).

[10]An equitable lien is "a right, not existing at law, to have specific property applied in whole or in part to payment of a peculiar debt or class of debts." Black's Law Dictionary 483 (5th ed. 1979).

[11]Hawaii Revised Statutes provides "[a]ny money judgment or decree of a state court or the United States District Court for the District of Hawaii shall be a lien upon real property when a copy thereof, certified as correct by a clerk of the court where it is entered, is recorded in the bureau of conveyances." Haw. Rev. Stat. § 636-3 (1993).

[12]A maritime lien is a

> privileged claim on a vessel for some service rendered to it to facilitate its use in navigation, or an injury caused by it in navigable waters, to be carried into effect by legal process in the admiralty court. [citation omitted]. A special property right in a ship given to a creditor by law as security for a debt or claim subsisting from the moment the debt arises with the right to have the ship sold and the debt paid out of proceeds. . . . Any person furnishing repairs, supplies, towage, use of dry dock or maritime railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel . . . .

Black's Law Dictionary 873-874 (5th ed. 1979).

forms must be disclosed under the UIPA because the public interest in disclosure outweighs any privacy interests therein.

D. Citizenship Status

The vessel registration form collects information on the status of an applicant's U.S. citizenship. The OIP has opined that an individual's citizenship status need not be segregated prior to disclosure of a public record so long as the identity of the individual about whom it pertains can be segregated. See OIP Op. Ltrs. No. 94-8 at 11-12 (May 12, 1994) (records relating to selection of candidate for promotion); No. 95-2 at 5-6 (Jan. 19, 1995) (background information concerning unsuccessful applicants). When responding to requests for vessel registration forms in which the application has not been granted and the name has been redacted, citizenship status need not be redacted.

However, names of owners of vessels are public if the application has been granted. The OIP has also opined in the past that when an individual's name is disclosed, citizenship status should be segregated because "the courts have vigorously protected the personal, intimate details of an individual's life, the release of which is likely to cause distress or embarrassment." OIP Op. Ltr. No. 90-25 at 6-7 (July 12, 1990) (citing J. Franklin & R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts § 1.09 at 1-128 (2d ed. 1989) in support of the OIP's opinion that citizenship status should be segregated from firearm registration forms). The OIP went on to note that the "intimate details" referred to by the Guidebook to the Freedom of Information and Privacy Acts include citizenship. Id. at 7 (citing the reference in J. Franklin & R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts § 1.09 at 1-128 (2d ed. 1989) to Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985); J. O'Reilly, 2 Federal Information Disclosure § 16.05 at 16-12 (1898) (citing Brown v. FBI, 658 F. 2d 71 (2d Cir. 1981) in support of the OIP's opinion that citizenship status should be segregated from firearm registration forms). Following this rationale, citizenship status should be segregated to protect individual privacy interests in that information when the applicant's name is public.

The remaining information collected on the vessel registration form, including side two of the form, the "Information Establishing Proof of Ownership" section, does not implicate privacy interests such that the information is protected from disclosure under section 92F-13(1), Hawaii Revised Statutes.

IV. REQUEST NEED NOT BE IN WRITING

The OIP has opined in the past that the UIPA does not expressly require individuals to make their requests in writing. OIP Op. Ltr. No. 93-7 at 7 (July 27, 1993) (noting that while House Bill 2002, § 1, 14th Leg. (1988), which created the UIPA, did contain a requirement that record requests be made in writing, that requirement was deleted from the final version of the bill). Record requesters need only provide a reasonable description of the records they seek, and they need not provide the reason they seek access to a particular record. Id. at 7-8 (noting that under Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); and Brumley v. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985), a request is reasonable if an agency employee familiar with the subject area can locate the record with a reasonable amount of effort).

However, the OIP always recommends that requesters put their requests in writing, and to clearly describe the record they seek. The OIP recommends written requests to avoid errors, confusion, and frustration, and because a written request creates a record in the event the requester seeks to challenge the response it receives from an agency.

The OIP's administrative rules, adopted pursuant to section 92F-42(12), Hawaii Revised Statutes, which became effective February 26, 1999, are entitled "Agency Procedures and Fees for Processing Government Record Requests." These rules set forth what information should be included in an informal or formal request for records. In the OIP's formal request process, a written request is required because it begins a paper trail that the requester and the agency build should any problems occur.

V. INTENDED USE OF REQUESTED INFORMATION

The OIP has opined, as noted above, that requesters need only provide a reasonable description of the records they seek, and they need not provide the reason they seek access to a particular record. OIP Op. Ltr. No. 93-7 at 7-8 (July 27, 1993). Agencies also cannot collect information from record requesters concerning whether the vessel owner knows of the record request[13], as the reason a

[13]However, the UIPA does provide that agencies shall disclose records if the requesting person has the prior written consent of all individuals to whom the record refers. Haw. Rev. Stat. § 92F-12(b)(1) (Supp. 1998).

person seeks access to a government record is generally irrelevant to the merits of the request. OIP Op. Ltr. No. 93-7 at 7 (July 27, 1993) (citing Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989), in support of the opinion that an inmate need not comply with a prison policy that he show he "has a need for" his own medical record).

Similarly, agencies cannot attempt to control a requester's use of the information subsequent to disclosure[14] because like the Federal Freedom of Information Act, and other states' public record laws, a requester's reason for making a request is irrelevant. See OIP Op. Ltr. No. 90-35 at 14 (Dec. 17, 1990) (citing Haw. Rev. Stat. § 92F-11(b) (1993); OIP Op. Ltr. No. 90-9 (Feb. 26, 1990); Aronson v. U.S. Department of Housing & Urban Development, 822 F.2d 182, 186 (1st Cir. 1987); Colombia Packing Co. v. U.S. Department of Agriculture, 563 F.2d 495, 499-500 (1st Cir. 1977); U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 744 (1989); and Techniscan Corp. v. Passaic Valley Water Commission, 549 A.2d 233 (N.J. 1988) in support of the opinion that an agency may not make a record requester promise not to use public information for a commercial purpose, as the reason for a record request is irrelevant).

Finally, an agency cannot require a record requester to assume responsibility and hold the State harmless in any civil suit arising from misuse of the requested information because government agencies cannot bargain away their duties under the UIPA. See OIP Op. Ltr. No. 92-21 at 6-7 (Oct. 27, 1992) (citing OIP Op. Ltr. Nos. 89-10 (Dec. 12, 1989); 90-39 (Dec. 31, 1990); Librach v. Cooper, 778 S.W.2D 351 (Mo. Ct. App. 1989); State ex. rel. Sun Newspapers v. Westlake Bd of Education, ___ N.E.2d ___, 1991 WL 398847 (Ohio Ct. App. 1991); and The Tribune Company v. Hardee Memorial Hospital, 1991 WL 235291 (Fla. Cir. 1991), in support of the opinion that an agency cannot bargain away its duties under the UIPA with promises of confidentiality, therefore a settlement agreement between the State and a private party must be made public despite a settlement term keeping the agreement confidential). Any government employee's fear about being sued based on the improper use of a government record after disclosure can be abated by the UIPA provision that states:

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[14]The exception to this rule is for inter-agency disclosures. Under the UIPA, an agency that receives government records from another government agency pursuant to section 92F-19(a), Hawaii Revised Statutes, shall be subject to the same restrictions on disclosure of the records as the originating agency. Haw. Rev. Stat. § 92F-19(b) (Supp. 1998).

> [a]nyone participating in good faith in the disclosure or nondisclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions.

Haw. Rev. Stat. § 92F-16 (1993).

VI. PROVIDING RECORDS IN FORM REQUESTED

If a requester seeks access to a record, the agency maintaining the record is required to make that information available in the form requested if the record is maintained in that form. See OIP Op. Ltr. No. 90-35 (Dec. 17, 1990) (in which the OIP relied on Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 N.Y.S.2d 564, aff'd, 560 N.Y.S.2d 642 (1990); and AFCME v. County of Cook, 555 N.E.2d 361 (Ill. 1990) for the premise that as long as information is physically maintained in the format requested, an agency must provide copies of the record in the format requested). Therefore, as the DLNR intends to continue to maintain paper records of vessel registration forms even after completion of the new database, if a requester seeks access to a paper copy, the DLNR should make the paper copy available, even if the information is also retrievable electronically. One way to minimize the time involved in segregating non-disclosable from public information is to reorganize the vessel registration form, and the electronic database, so that all information that will not be disclosed is in the same place and can be easily segregated.

CONCLUSION

Vessel registration forms should be made available for public inspection and copying after segregation of all information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. Names of applicants should be redacted if the application has not been granted. If the application has been granted, names are public, but other information should be segregated before disclosure, including home addresses, home telephone numbers, dates of birth, and citizenship status.

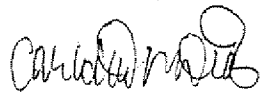
Although the OIP recommends that requesters make their requests in writing, agencies cannot require that record requests be in writing because the UIPA does not contain such a requirement. Agencies should not ask record requesters what their intended use of the requested record is, nor solicit other

information from the requester. Agencies should not condition disclosure upon promises by the requester pertaining to future use of the records or promises to hold the State harmless for misuse of the records.

Finally, upon request, agencies should provide a paper copy of a requested record if the agency maintains a paper copy, even though the agency could also make a printout of an electronic copy available.

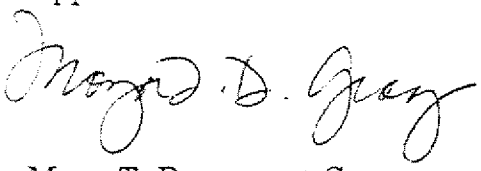
If you have any questions regarding the above issues, please feel free to contact me at the above telephone number.

Very Truly Yours,



Carlotta M. Dias
Staff Attorney

Approved:



Moya T. Davenport Gray

cc: Carol She', Boating Regulation Officer