LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

LESLIE H. KONDO
DIRECTOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
E-MAIL: oip@state.hi.us
WEBSITE: www.state.hi.us/oip

February 3, 2004

Mr. Ian Lind

Mr. Gregory Barnett

Re: Office of Disciplinary Counsel and Disciplinary Board

Dear Mr. Lind and Mr. Barnett:

This is in response to your requests to the Office of Information Practices ("OIP") for an opinion on whether the Office of Disciplinary Counsel ("ODC") and the Disciplinary Board of the Supreme Court of Hawaii ("Board") are subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA").

ISSUES PRESENTED

I. Whether the ODC and the Board are "agencies" under the UIPA.

II. If the ODC and the Board are "agencies" subject to the UIPA, whether their records are public.

BRIEF ANSWERS

I. Yes. Based upon the totality of the circumstances and excluding certain nonadministrative functions discussed herein, the ODC and the Board fall within the UIPA's definition of "agency." The ODC and the Board

are created and, to a significant extent, controlled by the Supreme Court of Hawaii. Moreover, the majority, if not all, of the ODC's and the Board's activities relating to attorney disciplinary matters are powers inherently belonging to the Supreme Court that have been delegated to them.

II. The UIPA's definition of "agency" excludes the nonadministrative functions of the courts of this State. Haw. Rev. Stat. § 92F-3 (1993). Thus, records relating to the nonadministrative functions of the courts are not subject to the UIPA. The discipline of attorneys is a nonadministrative function of the Supreme Court, which has been delegated, in part, to the ODC and the Board. Records of the ODC and the Board that pertain to the Supreme Court's nonadministrative function of disciplining lawyers are not subject to the UIPA, but are subject to other laws regarding disclosure. Purely administrative records of the ODC and the Board are subject to the UIPA.

FACTS

I. THE RECORD REQUESTS AND THE ODC'S RESPONSE

In a letter dated September 10, 1996, Mr. Ian Lind requested three types of records from the ODC: (1) records pertaining to any settlement or severance agreement with former Chief Disciplinary Counsel Laureen K.K. Wong made at or about the time of her resignation in July 1996, (2) minutes of the Board for the 6-month period ending July 30, 1996 reflecting administrative matters, and (3) any administrative staff reports or related materials for the same 6-month period.

Mr. Gregory Barnett alleged he asked the ODC for the names of the members of the Board who reviewed certain complaints filed by him with the ODC.

In denying the requests, the ODC and the Board asserted that neither are subject to the UIPA. According to both, they are not owned, operated, or managed by or on behalf of the State. Moreover, the ODC and the Board claim that they are private organizations, funded through fees levied by the Hawaii State Bar Association ("HSBA"), and that they do not receive any public funds. In denying Mr. Lind's request, the ODC and the Board further stated that the Board has a non-disclosure policy.

II. THE BOARD AND THE ODC

The Board is an 18-member body of lawyers and non-lawyers which oversees the system of disciplining attorneys. Rules of the Supreme Court of Hawaii ("RSCH") Rule 2.4(a). The members are appointed by the Supreme Court and serve staggered three-year terms. RSCH Rule 2.4(b). The Board is tasked with the responsibility of, among other things, considering and investigating ethics complaints against attorneys and attorney incapacity, supervising the ODC, adopting rules governing attorney discipline procedures, publishing advisory opinions interpreting the Hawaii Rules of Professional Conduct, and conducting hearings on formal disciplinary proceedings. RSCH Rules 2.4(e) and 2.5.

The Board appoints the Chief Disciplinary Counsel, an Assistant Disciplinary Counsel and any necessary ODC staff. RSCH Rule 2.4(e)(2). The ODC serves as "the day-to-day operational arm of the Disciplinary Board." Akinaka v. Disciplinary Board of the Hawaii Supreme Court, 91 Haw. 51, 56, 979 P.2d 1077, 1082 (1999) (citation omitted). The ODC investigates alleged attorney misconduct, prosecutes before the Board all disciplinary proceedings and proceedings to determine attorney incapacity, issues ethics opinions to lawyers, and provides general information to persons having difficulties with lawyers. RSCH Rule 2.6. As part of its responsibilities, the ODC determines whether the alleged misconduct should be dismissed, the attorney informally admonished, non-disciplinary proceedings for minor misconduct initiated or formal disciplinary proceedings filed. RSCH Rule 2.7(a). The ODC's recommendation is reviewed by one of two Board members assigned to review the ODC's recommendations. Id. If the Board member approves the ODC's recommendation, it is implemented. Id. If the recommendation is not approved, the ODC may request review by the other Board member and that member's decision is final. Id.

The Board issues dispositions in formal disciplinary proceedings, where the discipline considered is more serious. The Board can impose a private admonition or reprimand, or a public reprimand, all of which remain on the attorney's record. RSCH Rule 2.3. The Board can also recommend suspension or disbarment, which must be imposed by the Hawaii Supreme

Court. Id. These types of discipline may be public or confidential depending upon the circumstances. Some of the Board's opinions are posted on the HSBA's web site.

DISCUSSION

The UIPA governs access to records[1] of all State and county agencies. The UIPA defines an "agency" as:

> any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (1993). There is no dispute that the Supreme Court, as part of the judicial branch, is an agency under the UIPA, except as to its nonadministrative functions.

The ODC and the Board, however, assert that, while they were originally created by Court rule, they are private, non-government organizations.[2] According to the ODC and the Board, merely because they are recognized by the State does not subject them to the UIPA. To support their position, the ODC and the Board rely upon Barnard v. Utah State Bar, 806 P. 2d 526 (Utah 1991)[3] (the Utah State Bar, created by the Utah Supreme Court through its inherent judicial power to regulate the practice of

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[1] "Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

[2] The Board, in its response to the OIP's request, asserted a number of reasons to support its position that it is not subject to the UIPA. The Board's response appears to have been intended to be on behalf of both the Board and the ODC. For the purposes of this opinion, although certain portions of the Board's response refer only to the Board, the OIP has considered the arguments to be equally applicable to the ODC.

[3] This case was later amended in Barnard v. Utah State Bar, 158 Utah Ad. Rep. 3 (Utah 1991), which is discussed herein.

law, was found not to be an institution, authority or other agent of the state for purposes of Utah's public records law).

The OIP, however, does not find Barnard to be persuasive. In finding that the Utah State Bar is not a government agency, Barnard represents the decidedly minority view. [4]

The vast majority of the jurisdictions the OIP was able to find that have considered the issue have held that a state bar association is a public entity.[5] See, e.g., Lathrop v. Donohue, 102 N.W.2d 404, 411 (Wisc. 1960), *aff'd* 367 U.S. 820 (1961)(state bar created by the court is a state agency); Mire v. City of Lake Charles, 540 So.2d 950, 957 (La. 1989)(dissenting Justice noted that Louisiana State Bar Association created and regulated under the rule-making power of the Supreme Court of Louisiana); Ford v. Bd. of Tax-Roll Corrections, Oklahoma County, 431 P.2d 423, 431 (Okla. 1967) (Oklahoma Supreme Court's creation of state bar constituted creation by state action of a state agency); State of Oregon v. Oregon State Bar, 767 P.2d 893 (Ore. 1989) (state bar created by statute subject to Oregon public records law); GRECCA, Inc. v. Omni, Inc., 2003 Ga. LEXIS 938 (State Bar of Georgia an official arm of the Georgia Supreme Court); Mississippi State Bar v. Collins, 59 So.2d 351,355 (Miss. 1952) ("the State Bar, created by [an] act, possesses none of the attributes of a private corporation [and] is in reality an agency of the state"); State Bar of Michigan v. Lansing, 105 N.W. 2d 131,

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[4] The OIP further notes the Utah Supreme Court's citation to Keller v. State Bar of California, 110 S.C. Rptr. 2228, 2235 (1990), in which the U.S. Supreme Court stated that the California Bar examines applicants for admission, formulates professional conduct rules, and disciplines members, among other things, all of which are primarily funded by dues. However, while the Utah court read Keller as not finding the California Bar an agency, the OIP respectfully disagrees, noting the U.S. Supreme Court's statement:

> The California Supreme Court in this case held that respondent's status as a regulated state agency exempted it from any constitutional constraints on the use of its dues. . . . Of course, the Supreme Court of California is the final authority on the "governmental status" of the State Bar of California for purposes of state law. . . .[T]he very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. . . . The State Bar of California was created not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession.

Keller 110 S.C. Rptr. At 2234-2235.

[5] Indeed, we were unable to find any cases similar to Barnard.

133-34 (Mich. 1960) (rules of Michigan Supreme Court designate State Bar of Michigan, which has the power to prosecute attorney misconduct, as a public body corporate); Noffsinger v. Nebraska State Bar Ass'n, 261 Neb. 184, 190 (Neb. 2001) (in performing his or her powers and duties as delegated by the Supreme Court of Nebraska, the Counsel for Discipline is performing a judicial function and is entitled to quasi-judicial immunity); General Acci. Ins. Co. v. Hyatt Legal Services, 130 A.D.2d 970 (N.Y. App. Div. 4th Dep't 1987) (Disciplinary grievance committees are "governmental" and "regulatory" bodies because they are associated with the judicial branch of government and are responsible for regulating the practice of law and disciplining attorneys. Grievance bodies are also "agencies" because they act as the representative of the judiciary in regulating the activities of the legal profession.); Foley v. Alabama State Bar, 648 F.2d 355, 359 (5th Cir. 1981) (Alabama State Bar is a component of the Alabama Judiciary, and thus it acts as an agent of the state when it regulates attorneys); Hass v. Oregon State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989) ("[a] state bar operating as an instrumentality of the state supreme court is a state agency").[6] In so holding, some courts have quoted with approval the annotation entitled, "State bar created by act of legislature or rules of court; integrated bar," 114 A.L.R. 161:

> While the statutes or court rules under which [state bar associations] have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are government bodies.

See e.g. Lathrop, 102 N.W.2d at 411 (emphasis added); Ford, 431 P.2d at 430-31 (emphasis added).

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[6] See also In Re Riley, 691 P. 2d 695, 698-699 (Ariz. 1984) (State Bar Disciplinary Board and its committees are mere arms of Supreme Court); Board of Comm'rs v. Alabama State Bar, 324 S. 2d 256, 262 (Ala. 1975) (although Board of Bar Commissioners of Alabama State Bar was created by legislature, it is an arm of the supreme court); Dixon v. Statewide Grievance Comm., 2000 Conn. Super. LEXIS 3122 (Conn. 2000) (statewide Grievance Committee is an agent of the state as an arm of the judicial branch which possesses inherent power to regulate attorney conduct and to discipline the members of the bar).

Although the majority of other jurisdictions have concluded that a state bar association or other entity that disciplines lawyers and is created by the state supreme court is an agency of that state, for the purposes of determining whether the ODC and the Board are subject to the UIPA, there are certain factors that the OIP must weigh. As the ODC and the Board correctly recognize, in determining whether an entity is an agency as defined by the UIPA, the OIP has concluded that the issue "must be determined on a case-by-case basis and must be based upon a review of the totality of the circumstances." OIP Op. Ltr. No. 02-08 at 8 (Sept. 6, 2002).

I. TOTALITY OF THE CIRCUMSTANCES

In prior Opinions, the OIP has recognized that certain types of entities that are not traditionally perceived to be a government agency may nevertheless be an agency for purposes of the UIPA. See, e.g., OIP Op. Ltrs. No. 02-08 (Sept. 6, 2002) ('Olelo: The Corporation for Community Television and Ho'ike: Kauai Community Television, Inc.); No. 90-31 (Oct. 25, 1990) (Hawaiian Humane Society). To resolve whether an entity is an agency as defined by section 92F-3, HRS, the OIP considers four factors: (1) whether the entity was created by government, (2) the extent to which the entity is controlled by government, (3) whether the functions performed by the entity are government functions, and (4) the level of government funding. OIP Op. Ltr. No. 02-08 at 10 (Sept. 6, 2002).

A. The ODC and the Disciplinary Board are Created by the Supreme Court

In their response to the OIP, the ODC and the Board acknowledge that they were "originally created by rule of court." Rule 2.4, RSCH, expressly requires the Hawaii Supreme Court to appoint the Board, establishes the number of members, the length of their terms and how their terms shall be staggered, and outlines the Board's powers and duties, including the power to appoint the Chief Disciplinary Counsel. Similarly, Rule 2.6, RSCH, recites the powers and duties of the Disciplinary Counsel.

The Hawaii Supreme Court also has noted that it created the ODC and the Board. In re the Disciplinary Board of the Hawaii Supreme Court and the Office of Disciplinary Counsel, 91 Haw. 363 (1999). In a case involving

the handling by the ODC of a complaint against an attorney, the Court, treating the matter as a writ of mandamus[7], stated:

> [t]he Office of Disciplinary Counsel and the Disciplinary Board are creatures of this court, created pursuant to the court's inherent and constitutional authority to regulate the practice of law. **See** Rule 2, Rules of the Supreme Court of the State of Hawai'i[.]

Id. at 368 (citations omitted).[8]

Given the above, it is clear that the ODC and the Board were created by government, specifically, the Hawaii Supreme Court.

B. The Extent of Government Control

The ODC and the Board assert that they are not "owned, operated, or managed by or on behalf of the State[.]" In support of their argument, the ODC and the Board claim that Rule 17, RSCH, gives the HSBA the power to administer the ODC and the Board and, accordingly, that they are instruments of the HSBA. As evidence of their independence from government control, the ODC and the Board note that the Board enters into its own contracts, its employees are not employees of the State, and that other State agencies, such as the Department of Accounting and General Services, the State Foundation on Culture and the Arts, the Department of the Attorney General and the Office of the Administrative Director of the Courts, have determined that the Board is not a State agency for purposes of, among other things, procurement, appropriation, and inventory.

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[7] A mandamus is a writ issued by a superior court to a lower court or a government officer to perform mandatory or purely ministerial duties correctly. Black's Law Dictionary 973 (7th ed. 1999). The fact that the Supreme Court treats issues brought before it regarding the ODC and the Disciplinary Board as writs of mandamus is further evidence that both are governmental in nature.

[8] Other jurisdictions have held similarly. See, e.g., Wade v. State Bar of Arizona, 948 F. 2d 1122, 1123 (1991) (The Ninth Circuit found that although the Arizona State Bar was not a governmental unit for all purposes, it is an instrumentality of the Arizona Supreme Court for the purpose of prosecuting attorney disciplinary proceedings); In re Riley, 142 Ariz. 604, 607-608 (1980) (the Arizona State Bar Disciplinary Board and its committees are mere arms of the Supreme Court).

The OIP does not dispute that many, even most, of the ODC's and the Board's day-to-day administrative operations may be dictated by the HSBA; however, the State, through the Court, also has considerable control over the ODC's and the Board's functions. More specifically, as noted above, the Board is appointed by the Court, which in turn appoints the Chief Disciplinary Counsel and other employees of the ODC. RSCH Rule 2.4. Clearly, through the process established by the RSCH, the Court enjoys substantial control over the composition of the Board and, to a lesser extent, the ODC.[9] In addition, the Court, through its rules, establishes the ODC's and the Board's duties and powers. Id. At a minimum, because the Court is free to change its rules regarding the ODC's and the Board's duties and powers, the Court indirectly controls the ODC and the Board, including the types of decisions that each render.

Moreover, contrary to the ODC's and the Board's assertions, it is apparent that the Court believes that the Board is under its control. The Judiciary website indicates that the Chief Justice is responsible for the administration of the courts and certain boards and commissions.[10] The boards and commissions that are listed on the website as being within the Chief Justice's administration include the Board.

In analyzing whether an entity is controlled by government for purposes of determining if it is an agency under the UIPA, the OIP has never required that government control all of the entity's operations. See OIP Op. Ltrs. No. 02-08 (Sept. 6, 2002); No. 90-31 (Oct. 25, 1990). The fact that certain of the ODC's and the Board's day-to-day functions, such as contracting, may be within their own control or may be controlled by the HSBA does not compel the conclusion that the State has no control over the ODC and the Board. With respect to the ODC and the Board, given the above facts, the OIP is of the opinion that the State, through the Court, exercises significant control over the ODC and the Disciplinary Board.

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[9] The Court also has substantial control over certain of the HSBA's functions, including those relating to attorney discipline. See RSCH Rule 17(b).

[10] *Available at* http://www.courts.state.hi.us/page_server/Courts/15E851A8D0C68931EBDEBB815B.html (January 30, 2004).

C. Governmental Function

Next, the OIP looks at the extent to which the ODC performs a governmental function. While the ODC and the Board acknowledge that the Board aids the Court "by way of governance of the profession," they maintain that their duties do not include a government function because they do not admit anyone to the practice of law, do not suspend or disbar attorneys, and do not establish ethical rules.

Both through its inherent power and by statute, the Court is tasked with regulating the practice of law, including the disciplining of attorneys. See In re Trask, 46 Haw. 404, 415 (1963) ("the power to regulate the admission and disbarment or disciplining of attorneys is judicial in nature and is inherent in the courts"); Haw. Rev. Stat. § 605-1 (1993). It is equally clear that the Court created the ODC and the Board to perform some of the Court's duties in regulating the profession. See RSCH Rule 2.1 ("Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established"). In discussing the ODC's and the Board's role, the Court has said:

> In effect, ODC, the Disciplinary Board, and the committees appointed pursuant to Rule 2, function as this court's special masters to carry out this court's authority to investigate, prosecute, dispose of, or make recommendations about attorney disciplinary matters. Cf. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 434, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) note 13 ("The role of local ethics or bar association committees may be analogized to the function of a special master"). Duties imposed by Rule 2 upon ODC and the Disciplinary Board are duties owed to this court. In furtherance of those duties and in recognition of the limited resources available and the difficulties inherent in prosecuting any accusation of unethical behavior, our rules grant to ODC and the reviewing Disciplinary Board members the discretion to determine whether pursuit of particular disciplinary allegations is warranted.

In re the Disciplinary Board of the Hawaii Supreme Court and the Office of Disciplinary Counsel, 91 Haw. 363, 368-369 (1999). In its conclusion to this case, the Court went on to state "ODC's and the Disciplinary Board's duties are owed to this court, not to the individual complainant. Further, the duties imposed upon ODC and the Disciplinary Board under Rule 2 are more than "ministerial" and involve judgment and discretion . . ." Id. at 371.

Based upon the ODC's and the Board's duties as set forth in the RSCH and the Court's statements about the ODC's and the Board's roles, the OIP has no difficulty in concluding that the ODC and the Board perform certain functions of the Court, i.e., government functions. In fact, in another context, the ODC and the Board appear to have concurred with the OIP's conclusion. In Akinaka v. Disciplinary Board, 91 Haw. 51 (1999), in seeking to dismiss a complaint, or in the alternative, for summary judgment, the ODC and the Board asserted that, *inter alia*, they were immune from civil liability on the bases of: (1) RSCH Rule 2.8; (2) the doctrine of absolute quasi-judicial immunity; (3) section 26-35.5, HRS, and (4) the doctrine of sovereign immunity. Id. at 54, n. 4. Although the Court affirmed the circuit court's judgment because the appellant lacked standing, on at least one occasion, the ODC and the Board appear to have maintained that they are entitled to immunity from litigation as quasi-judicial or sovereign bodies, clearly protections afforded only to government bodies.

The OIP further notes that there are two other indicia that the State and/or the ODC and the Board consider the ODC and the Board to be State agencies or, at a minimum, to be performing government functions. First, the Department of the Attorney General's web site indicates that its Administration Division provides legal support to the ODC.[11] See also

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[11] The Attorney General's web site states:

> The Administration Division is principally responsible for commercial and financial related legal issues. ***The division provides legal advice and litigation support to various departments including*** the Department of Accounting and General Services (includes ICSD, State Foundation on Culture and Arts), the Department of Budget and Finance (including advice regarding bond matters and advice to the Employees Retirement System); the Judiciary (includes Office of Judiciary Counsel, ***Office of Disciplinary Counsel***, Board of Bar Examiners, Judicial Selection Commission); Land Use Commission; the Health Fund; the Stadium Authority; and the Public Defenders Office.

available at http://www.hawaii.gov/ag/legal_divisions.htm (Jan. 30, 2004) (emphasis added).

Akinaka, 91 Haw. 51; In re Trask, 46 Haw. 404 (1963). The Department of the Attorney General represents the State and its agencies. Haw. Rev. Stat. § 28-1 (1993). By statute, the Department of the Attorney General is prohibited from the private practice of law. Haw. Rev. Stat. § 28-10 (1993). Second, the correspondence from the ODC and the Board to the OIP is written on the Court's letterhead.

Accordingly, the OIP is of the opinion that the ODC and the Board are performing, at the direction of and on behalf of the Court, the Court's judicial function of disciplining attorneys. For reasons stated above, the ODC and the Board perform a government function.

D. Governmental Funding

The ODC and the Board receive no funding from any branch of government, no public funds, and no tax revenues. Their budget is derived from dues paid to the HSBA by attorneys. Rule 2.4(e)(8) RSCH (July 1, 2002). The ODC and the Board assert that, unlike the Board of Examiners of the Supreme Court which is subject to the UIPA[12], the Board, in addition to not receiving taxpayer funds, is neither housed within the Judiciary nor supervised by the Supreme Court's Chief Clerk. The ODC and the Board claim that the Board is a private organization. The ODC and the Board further note that Board employees are not paid by the State and are not entitled to benefits State employees have, including the pension plan.[13]

In establishing the HSBA and requiring all attorneys licensed to practice law in this State to be members of the HSBA, the Court granted the HSBA's Board of Directors the power to determine the amount of annual dues, disciplinary board fees and other charges that each member of the bar must pay to HSBA. RSCH Rule 17. The Board's annual budget for the Board

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[12] See section II., below, for a detailed discussion of the OIP Opinion Letter Number 93-8 on the application of the UIPA to the Board of Examiners of the Supreme Court.

[13] Board members receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties. RSCH Rule 2.4(b) (January 1, 2000).

and the ODC is submitted to the HSBA for approval. The budget is also subject to approval and audit by the Supreme Court.[14]

While, as the ODC and the Board assert, their budget comes from bar dues and not taxpayer revenues, the OIP finds that the Court maintains an indirect control over the budget because: (1) the RSCH, which are subject to amendment by the Supreme Court at any time, prescribe budgetary procedures of the ODC and the Board, (2) the Supreme Court approves the budget, and (3) the budget papers are subject to Supreme Court audit. In light of these three determining factors, the OIP finds that the fact that the actual monies for the budget come from dues paid to the HSBA by licensed attorneys is not dispositive, and that the Supreme Court does exert a measure of control over the budget even though the government is not the source of the funding.

E. Conclusion

The OIP is of the opinion that, looking at the totality of the circumstances, the ODC and the Board are "agencies" under the UIPA's

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[14] The Supreme Court has given the Board the following powers and duties with regard to its budget:

> (7)(i) To develop an annual budget for operating the Office of Disciplinary Counsel and performing the functions of the Board, to develop appropriate financial policies for managing of all funds received by the Board, and to propose an annual fee;
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> (ii) to submit, no later than September 15 each year, the developed budget, financial policies, and fee structure to the Hawaii State Bar to allow an opportunity for meaningful review, analysis, input, and comment by the Hawaii State Bar prior to submission to the supreme court;
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> (iii) to receive written comments, if any, from the Hawaii State Bar regarding the budget, financial policies, and fee structure;
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> (iv) to reply in a timely fashion in writing to any written comments from the Hawaii State Bar regarding section (iii), provided the comments were received no later than October 15; and
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> (v) to submit, no later than November 1 each year, the budget, financial policies, and annual fee along with any and all written comments received from the Hawaii State Bar, and any replies thereto, to the supreme court for its review and approval.
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> (8) To receive from the Bar all funds collected by the Bar for the Board, and to have exclusive control and responsibility over all financial transactions; and to develop and maintain appropriate accounting records showing the receipt and disposition of those funds, which records shall be subject to audit as directed by the supreme court.

Rule 2.4(e)(7), (8) RSCH (July 1, 2003).

definition because they operate on behalf of the Court, which is part of the State's judicial branch. The ODC and the Board were created by the Court, are to a large extent controlled by the Court, perform the Court's function of disciplining attorneys, and prepare their budget according to the RSCH.

The OIP's conclusion is further buttressed by other factors. It is apparent that the State considers the ODC and the Board to be quasi-State agencies. The ODC is represented by the Department of the Attorney General; the Judiciary, on its website, indicates that the Chief Justice is responsible for administering the Judiciary's boards, including the Board; and the ODC and the Board are allowed to correspond on letterhead bearing the seal of the Court.

Based upon the totality of the circumstances, the OIP concludes that the ODC and the Board are "agencies" as defined by section 92F-3, HRS, to the extent that they are performing administrative functions of the "courts of this State." As discussed below, the ODC's and the Board's records relating to their non-administrative functions are outside of the UIPA.

II. NONADMINISTRATIVE FUNCTIONS OF THE COURTS

The determination that the ODC and the Board are agencies under the UIPA does not compel the conclusion that their records are public. The UIPA specifically excludes the records relating to the courts' nonadministrative functions from purview of the UIPA. Haw. Rev. Stat. § 92F-3 (1993).[15] Accordingly, the OIP must next determine whether the discipline of attorneys is a "nonadministrative function" of the Supreme Court. If it is, then the records of ODC and the Board which pertain to the discipline of attorneys are not subject to the UIPA.

The OIP has found on many occasions that particular aspects of the courts were nonadministrative in nature, and thus their records were not subject to the UIPA. In so opining, we stated that:

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[15] The UIPA's legislative history indicates that the nonadministrative records of the Judiciary were excluded from the UIPA "to preserve the current practice of granting broad access to the records of court proceedings," and that "the records of the Judiciary which will be affected by this bill are the administrative records." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 1017, 1018 (1988).

> nonadministrative records of the courts, generally speaking, are those records which are provided to the court incident to the adjudication of a legal matter before the tribunal. Such a construction means that records including, but not limited to, charging documents, complaints, motions, pleadings, clerk's minutes, legal memoranda, exhibits, orders, and decisions are not subject to the provisions of the UIPA.

OIP Op. Ltr. No. 90-4 at 5-6 (Jan. 29, 1990) (emphasis in original). The Chief Justice's administrative functions are set forth at section 601-2, HRS. Based on this statute, records of matters such as accounting, budgeting, personnel, payroll, scheduling, purchasing, judicial assignments, data processing, and record keeping were examples of "administrative tasks" subject to the UIPA. OIP Op. Ltr. No. 93-8 at 6 (Aug. 2, 1993).

In the case most analogous to this one, we looked at whether records of the Board of Examiners of the Supreme Court were nonadministrative records of the courts, and thus not subject to the UIPA. OIP Op. Ltr. No. 93-8 (Aug. 2, 1993). The Court examines and admits qualified persons as practitioners in the State courts. Haw. Rev. Stat. § 605-1 (Supp. 2002). We opined that records maintained by the Board of Examiners containing a Bar examinee's scores, graded answers, and the correct answers, are records relating to the nonadministrative functions of the Court. OIP Op. Ltr. No. 93-8 (Aug. 2, 1993).[16] Accordingly, we concluded that a bar applicant's right to inspect his or her scores and graded answers on the Bar Examination, and the correct answers to the Bar Examination, is governed by laws other than the UIPA. While we found that matters associated with the admission of attorneys primarily involve the exercise of a judicial, as opposed to an administrative, function, we noted that not all records of the Board of Examiners were unaffected by the UIPA. OIP Op. Ltr. No. 93-8 at 10-11 (Aug. 2, 1993).[17]

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[16] The process of admission to the Hawaii State Bar is administered by the Board of Examiners, and the Supreme Court maintains the "ultimate authority . . . to oversee and control the privilege of the practice of law in this State." Rule 1.1 of the Rules of Supreme Court of the State of Hawaii (January 1, 2000).

[17] In another Opinion discussing the nonadministrative functions of the courts, we found that court files connected with pending or closed Circuit Court cases and proceedings are nonadministrative records of the Judiciary, and that the public's right to inspect and copy them is not governed by the provisions of the UIPA. OIP Op. Ltr. No. 93-11 (Sept. 14, 1993).

In this case, as noted above, the ODC and the Board were created by the Supreme Court to "function as [the Court's] special masters to carry out this court's authority to investigate, prosecute, dispose of, or make recommendations about attorney disciplinary matters." In re the Disciplinary Board of the Hawaii Supreme Court and The Office of Disciplinary Counsel, 91 Haw. at 368-369. The Court further noted that "the duties imposed upon ODC and the Disciplinary Board under Rule 2 are more than 'ministerial' and involve judgment and discretion . . ." Id. at 371.

The OIP believes that, like the duties performed by the Board of Examiners, the ODC's and the Board's functions relating to the alleged professional misconduct or incapacity of attorneys are nonadministrative functions of the Supreme Court. The ODC's and the Board's investigation of ethics complaints against attorneys and the disciplinary proceedings are functions that would otherwise be performed by the Court and are more than administrative. Accordingly, records of the ODC and the Board that pertain to the discipline of attorneys are not subject to the UIPA, but are subject to other laws. See, e.g., RSCH Rule 2.22 (January 1, 2004).[18]

In the OIP Opinion Letter Number 02-10, we found that the UIPA does not apply to government records pertaining to the nonadministrative functions of the Administrative Driver's License Revocation Office ("ADLRO"), which is attached to the Judiciary, because the law which establishes the driver's license revocation process assigns its review of evidence and decision-making duties to an officer of the Judiciary, and as the ADLRO's principal function is adjudicative, access to the ADLRO's non-administrative records is not governed by the UIPA.

[18] This Rule, entitled "Confidentiality," states:

(a) *General Rule.* The files, records, and proceedings of the Board, the hearing committees or officers, and Counsel, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees or officers, the Board, and the court in the furtherance of their duties;

(2) As between the Board, Counsel, and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by this court;

(5) Where required or permitted by these rules;

Mr. Lind requested access to: (1) records pertaining to any settlement or severance agreement with former Chief Disciplinary Counsel Laureen K.K. Wong made at or about the time of her resignation in July 1996, (2) minutes of the Board for the 6-month period ending July 30, 1996 reflecting administrative matters, and (3) any administrative staff reports or related

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(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(7) Where this court enters an order transferring the respondent to inactive status pursuant to Rule 2.19; or

(8) Where 90 days have passed since the service on a respondent of a Petition for discipline, unless such time is extended by the Board Chairperson for no more than 45 days for good cause shown.

(b) Upon receipt of trustworthy evidence that an attorney has committed a crime and to protect the interests of the public, the administration of justice, or the legal profession, the Chairperson of the Board may authorize Counsel to disclose the evidence to appropriate law enforcement or prosecuting authorities. Counsel may not disclose that an attorney voluntarily sought, received, or accepted treatment from the Attorneys and Judges Assistance Program or the record of such treatment.

(c) The Chairperson of the Board, upon the receipt of trustworthy evidence, may authorize Counsel to disclose an attorney's possible substance abuse, physical or mental illness, or other infirmity to the Director of the Attorneys and Judges Assistance Program.

(d) An affidavit resigning in lieu of discipline or consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing committee or officer, to the Board, and to this court at any time that the attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

(e) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the respondent, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without pre-judgment, and to state that the respondent denies the allegations. The statement shall be first submitted to the respondent involved for his or her comments and criticisms prior to its release, but the Board in its discretion may release the statement as originally prepared.

(f) Except as ordered by this court, or as otherwise provided by these rules, the files, records and proceedings filed with this court by the Board, by Counsel or by a respondent, as well as any oral argument held before the court in connection with any disciplinary proceedings, are not confidential.

RSCH 2.22 (January 1, 2004).

materials for the same 6-month period. All the records requested by Mr. Lind appear to be administrative in nature rather than pertaining to nonadministrative functions of the Supreme Court, and thus are subject to the UIPA and Chapter 2-71, Hawaii Administrative Rules ("HAR"). Based on the conclusion rendered herein, the OIP advises, by way of a copy of this Opinion, that the ODC respond to Mr. Lind's request by providing access to all responsive records that are not subject to withholding under section 92F-13, HRS.[19] Because the ODC refused the OIP's request for a copy of the settlement agreement between the ODC and Ms. Wong and for copies of the minutes and other documents requested by Mr. Lind, the OIP has not reviewed the requested records and, accordingly, cannot opine whether an exception in section 92F-13, HRS, may justify withholding any of the records.

To assist the ODC and the Board in their analysis of Mr. Lind's record requests, the OIP notes that, as a general statement, settlement agreements involving a government agency cannot be withheld from public disclosure. While confidentiality provisions frequently are inserted in settlement agreements, the ODC and the Board are hereby advised that such provisions do not supercede the requirements of the UIPA and do not protect the document from public disclosure. Absent a statutory basis for withholding the record, the public is entitled to know the terms of any settlement entered into on the public's behalf. In addition, the OIP further comments that, because Mr. Lind's request is specifically limited to records relating to the

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[19] This section states that this part shall not require disclosure of:

(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).

administrative matters, those records must be disclosed unless one or more of the exceptions set forth in section 92F-13, HRS, are applicable.

Mr. Barnett alleges he asked the ODC for the names of the members of the Board who reviewed certain complaints filed by him with the ODC. While this request is not clear, it appears to pertain to records that are nonadministrative in nature. Accordingly, Mr. Barnett's record request is not subject to the UIPA but is subject to other laws over which the OIP does not have jurisdiction.

Finally, in denying Mr. Lind's request, the ODC and the Board stated that the Board has a non-disclosure policy. It is axiomatic that the ODC and the Board cannot adopt a policy that is contrary to State law. Accordingly, where the UIPA requires disclosure of records, the ODC's and the Board's non-disclosure policy cannot supercede that requirement. The OIP recommends that the ODC and the Board revise this policy to allow for public inspection and copying of its administrative records in accordance with the UIPA.

CONCLUSION

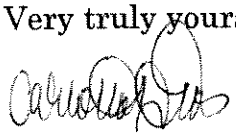
Under the OIP's "totality of the circumstances" test, the ODC and the Board fall into the UIPA's definition of "agency" because they operate on behalf of the Supreme Court, and thus are subject to the UIPA.

The UIPA's definition of "government record" does not include the nonadministrative functions of the courts of this State. Haw. Rev. Stat. § 92F-3 (1993). The discipline of attorneys is a nonadministrative function of the Supreme Court, which has been delegated, in part, to the ODC and the Disciplinary Board. Records of the ODC and the Board that pertain to the Court's nonadministrative function of disciplining lawyers are not subject to the UIPA, but are subject to other laws regarding disclosure. Purely administrative records of the ODC and the Board are subject to the UIPA.

The ODC should respond to Mr. Lind's record request in accordance with the UIPA and Chapter 2-71, HAR. As to Mr. Barnett's request, his statement that he requested "who made a determination that ethical rules

were not broken," is not clear, but appears to be nonadministrative in nature and, thus, not subject to the UIPA.

Very truly yours,



Carlotta Dias
Staff Attorney

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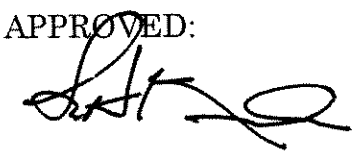

Leslie H. Kondo
Director

CMD:ankd

cc: Ms. Carole Richelieu, Chief Disciplinary Council
Mr. Thomas Russi
Ms. Christine Paul