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April 2, 2004

Mr. Al Konishi
County Clerk, County of Hawaii
Hawaii County Building
25 Aupuni Street
Hilo, Hawaii 96720

Re: Lists of Voters

Dear Mr. Konishi:

This is in response to your request to the Office of Information Practices ("OIP") for an opinion on the above-referenced matter.

ISSUES PRESENTED

I. Whether the General County Register required to be maintained by the County Clerk under section 11-14, Hawaii Revised Statutes ("HRS"), which contains, among other things, the name and address of each voter, is public under the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"), when requested for purposes unrelated to "government or elections."

II. Whether the UIPA requires the County Clerk to provide a copy of the alphabetical list of registered voters, district/precinct, and status, which is available for review, to the public.

III. Whether, if an election map does not exist, the County Clerk is required to create a map upon receipt of a record request.[1]

BRIEF ANSWERS

I. No. Section 92F-13(4), HRS, allows an agency to withhold records that are protected from public disclosure by another State law. Section 11-14, HRS, provides that the General County Register is only available for "election or government purposes." The OIP interprets section 11-14, HRS, as protecting the General County Register from general disclosure and, accordingly, believes that the County Clerk is entitled under the UIPA to deny access to the General County Register to a member of the public who is not seeking the record for "election or government purposes."

II. Yes. The UIPA requires an agency to make all public records available for inspection *and* copying during regular business hours. Haw. Rev. Stat. § 92F-11(b) (1993). Section 11-97, HRS, requires that the information contained in the list maintained by the County Clerk be public. Section 2-71-15, Hawaii Administrative Rules ("HAR"), does allow an agency to make incremental disclosures in response to requests for voluminous amounts of records in order to avoid an unreasonable interference with the agency's other statutory duties and functions.

III. No. The UIPA does not require agencies to create records where none exist, unless the information is readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993).

FACTS

As the County Clerk for the County of Hawaii, you are required by statute to register the voters on the Big Island in the General County Register. The information about each voter contained in the General County Register includes, among other things, the name and address of each voter. The voters' names are required to be maintained alphabetically and must be capable of being segregated by precinct and representative district.

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[1] You also asked whether a verbal statement that a person is considering running for office is sufficient under section 11-97, HRS, to allow an individual access to the General County Register. Section 2-51-31(c), Hawaii Administrative Rules, lists six "election or government purposes" when then General County Register is available, and section 11-191, HRS defines "candidate." Your question, however, is beyond the OIP's jurisdiction and is best addressed to your Corporation Counsel or the Department of the Attorney General.

You have informed the OIP that, in addition to the General County Register, you, through the Elections Division Office ("EDO"), maintain a list containing, among other things, each voter's name, arranged alphabetically, district/precinct designation for the voter, and the voter's status ("The Public List"). The EDO maintains The Public List in binders available for public review.

An email to you dated December 4, 2003 from Patricia Nakamoto of the EDO advised that, on November 21, 2003, Mr. Jay Scharf requested a copy of the General County Register. In response to Mr. Scharf's request, he was asked to fill out an "Affidavit On Application For Statewide Voter Registration Data." Question 2 of this Affidavit asks the applicant whether the information is being sought for an upcoming election or government purpose. Mr. Scharf wrote "Council Election" and stated verbally that he was considering becoming a candidate and wanted the list for that purpose. Mr. Scharf was denied access to the General County Register, but was offered The Public List for his review. Mr. Scharf declined the EDO's offer of access to The Public List. In a subsequent conversation, you advised Mr. Scharf that members of the public are entitled to access only The Public List.

Another email to you dated December 8, 2003 from Ms. Nakamoto advised that Mr. Scharf had requested a map for Council District 4 and that he was purchasing this map for Hawaii County Councilmember Bob Jacobson. EDO Staff explained that the EDO maintains only an "Island View" map and four regional maps of the Council districts. These were provided to Mr. Scharf for review. Mr. Scharf asked for a written statement indicating the EDO did not have the map he requested. EDO Staff, however, asked Mr. Scharf to have Councilmember Jacobson call to explain what type of map he wanted because it appeared that Mr. Scharf was unsure of what the Councilmember wanted.

DISCUSSION

I. THE GENERAL COUNTY REGISTER AND THE PUBLIC LIST

Your first question asked whether the General County Register is public. The UIPA operates on the presumption that all records[2] maintained

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

by government agencies[3] are public unless an exception to disclosure at section 92F-13, HRS, applies. Haw. Rev. Stat. § 92F-11 (1993). The facts that the General County Register and The Public List are government records and that the EDO is an agency are not in dispute.

The UIPA allows agencies to withhold access to records in only five instances. Applicable here is the exception to disclosure for records that are protected from disclosure by a State or federal law or court order. Haw. Rev. Stat. § 92F-13(4) (1993).

Chapter 11, HRS, contains the following requirements regarding access to the General County Register and The Public List:

> **§11-14 General county register; restrictions in use.** (a) The clerk of each county shall register all the voters in the clerk's county in the general county register. The register shall contain the name and address of each voter unless such address is deemed confidential pursuant to section 11-14.5. Additional information required by section 11-15 may be included in the register at the discretion of the clerk. The voter's name shall be maintained alphabetically in the register and be capable of segregation by precinct and representative district. The clerk shall keep the original or photographic copy of the affidavit of registration required by section 11-15. <u>The general county register shall be available for election or government purposes only in accordance with section 11-97.</u>
>
> (b) The affidavits filed under section 11-15 and the general county register may be copied, and the clerk may release voter lists and tabulating cards or computer tapes containing data furnished in the affidavit; <u>provided that information furnished in the affidavits, register, voter lists, cards, or tapes, shall be copied or released for election or government purposes only in accordance with section 11-97.</u>
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> . . .

[3] "Agency" means "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).

Haw. Rev. Stat. § 11-14 (Supp. 2003) (emphasis added).

> **§ 11-97 Records open to inspection.** (a) A voter's full name, district/precinct designation, and voter status shall be public; but all other personal information, as provided on the voter registration affidavit, shall be confidential except for election or government purposes in accordance with rules adopted by the chief election officer, pursuant to chapter 91.

Haw. Rev. Stat. § 11-97(a) (Supp. 2003) (emphasis added).

Based on sections 11-14 and 11-97, HRS, it is clear that the General County Register is not public and may be disclosed only for limited purposes – those pertaining to election or government purposes. We read these sections to be State laws protecting the General County Register from general public disclosure. Accordingly, section 92F-13(4), HRS, allows the EDO to withhold the General County Register from the public, except when the request is for election or government purposes.[4]

You advised that Mr. Scharf asserted to the EDO that the General County Register is public based on the OIP Opinion Letter Number 90-22. The OIP Opinion 90-22 held that, under the UIPA, the public has the right to inspect and copy computer tapes containing data furnished in voter registration affidavits. That Opinion was based on chapter 11, HRS, which, at the time that the issue was considered by us, expressly provided that voter registration affidavits, and records "appertaining to" the registry of voters or to elections, were public. Insofar as sections 11-15(d) and 11-14(b), HRS, permitted the inspection and duplication of voter registration affidavits, we concluded that the Legislature did not intend that section 11-14(b), HRS, be applied to restrict access to computer tapes containing similar data.

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[4] We do not comment as to whether Mr. Scharf's statements that he was considering running for office is sufficient for him to have access to the General County Register under the "election or government purposes" language in chapter 11, HRS. This issue is beyond our jurisdiction and is best addressed to your Corporation Counsel or the Department of the Attorney General.

Chapter 11, HRS, however, was amended by SECTION 5 of Act 156, Session Laws, 1990, after issuance of OIP Opinion Letter Number 90-22.[5] Insofar as the law now conflicts with Opinion 90-22, that Opinion is overruled.

II. "ACCESS" UNDER THE UIPA INCLUDES INSPECTION AND COPYING

The UIPA requires that government records not otherwise protected from public disclosure be available for inspection *and* copying during business hours. Haw. Rev. Stat. § 92F-11(b) (1993). In addition, agencies must provide "reasonable access to facilities for duplicating records[.]" Haw. Rev. Stat. § 92F-11(d) (1993). Therefore, if a record is public, i.e., there is no statutory basis for an agency to withhold the requested record, the statute does not allow an agency to deny a request for a copy. If, for example, an agency maintains a public record which is too large to be accommodated by the agency's copying facilities, the agency must make a reasonable accommodation for the record requester. What is reasonable depends on the specific circumstances but could include, for example, sending the originals to

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[5] The legislative history of Act 156 notes that its purpose is to "limit access to voter registration information for election or governmental purposes only..." H. Conf. Comm. Rep. No. 44, 15th Leg., 1990 Reg. Sess., Haw. H.J. 772 (1990). The Committee Report goes on to state that "the best way to balance the interests of the individual, the public, and the government, is to limit the public's access to information disclosed for voter registration purposes for government and election purposes only." Id. Finally, the Committee Report states that the bill that became Act 156 was intended to include the following parties and uses under election and government purposes:

1. Political parties and Political Action Committees who are properly registered with the Campaign Spending Commission;

2. Special interest campaigns conducted on issues relating to initiative, referendum, and recall;

3. Incumbents communicating with constituents;

4. Electioneering by special interest groups to urge people to register to vote or to encourage people to vote in particular election contests or on particular issues; and

5. Federal, state, and county agencies conducting legitimate government activities.

Id. at 773. Various sections of chapter 11, HRS, have been amended in different years subsequent to 1990. Those amendments are not discussed here as this chapter continues to limit access to certain election records for "election or government purposes."

a duplication facility capable of making the copies.[6] However, agencies are not required to let members of the public remove original records from government offices. The person requesting the copy is liable for costs involved making the copies, and may be required to pay the costs in advance. See Haw. Rev. Stat. § 92-21 (Supp. 2003), Haw. Admin. R. §2-71-19 (1999). In addition, section 2-71-15, Hawaii Administrative Rules ("HAR"), allows an agency to make incremental disclosures in response to requests for voluminous records when the agency experiences extenuating circumstances which allow it additional time to respond to a record request. For example, agencies may have additional time to respond to record requests and may make incremental disclosures in order to avoid an unreasonable interference with the agency's other statutory duties and functions. Haw. Admin. R. § 2-71-15 (1993).

In this case, based upon the information that you provided to the OIP, it appears that the EDO properly offered to make The Public List available to Mr. Scharf for review. If, however, Mr. Scharf seeks a copy of The Public List the EDO must provide him with a copy of the record. Moreover, the statute does not require an agency to maintain copies of its records for the purpose of responding to a record request. As mentioned above, in the case where the requested record is voluminous, an agency is entitled to make the record available to the requester in increments. Haw. Admin. R. § 2-71-15 (1993).

III. AGENCIES NEED NOT CREATE RECORDS WHERE NONE EXIST, UNLESS THE INFORMATION IS READILY RETRIEVALBE

Government agencies need not create records where none exist, unless such information is readily retrievable from existing records. Haw. Rev. Stat. § 92F-11(c) (1993).[7] Ms. Nakamoto's email advised that Mr. Scharf

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[6] This is a suggestion for agencies to consider in light of the UIPA's language requiring that record requesters be given "reasonable access to facilities for duplicating records." Haw. Rev. Stat § 92F-11(d) (1993). This Opinion is not meant to impose a requirement that an agency allow this method of access. What is "reasonable access for facilities for duplicating records" depends upon an individual agency's circumstances.

[7] Other laws may exist which require the creation or retention of records by government agencies, but the UIPA contains no such requirements. The OIP reviewed section 92F-11(c), HRS, in OIP Opinion Letter Number 90-35:

> Section 92F-11(c), Hawaii Revised Statutes, is identical to section 2-102(b) of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners of Uniform State laws. The commentary [. . .] to this provision is instructive, and states that this provision "makes plain that the agency's

asked for a map of Council District 4. No such map exists. The EDO maintains only an "Island View" map and four regional maps of the Council districts. The EDO is not required to provide Mr. Scharf with a map of Council District 4 unless such a map is readily retrievable.

Mr. Scharf allegedly asked for a written statement indicating the EDO did not have the map he requested. Agencies are required to provide a written notice in accordance with section 2-71-14, HAR, in response to a formal record request[8]. Because his request was verbal, Mr. Scharf's request was an informal request[9], and the EDO was not required to provide a written notice of its inability to disclose the requested record. See Haw. Admin. R. § 2-71-11 (1999). It is appropriate, however, for the EDO to ask Mr. Scharf to submit a formal request. If Mr. Scharf submits such a request, the EDO must respond in writing within 10 business days. Haw. Admin. R. § 2-71-13 (1999). If the EDO does not maintain the requested record, i.e., in this case, it doesn't exist, the EDO's response must so state. See Haw. Admin. R. § 2-71-14(c) (1999).

CONCLUSION

The General County Register is confidential under section 11-14, HRS, and is only available for "election or government purposes." Accordingly, the General County Register may be withheld under section 92F-13(4), HRS.

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duty is to provide access to existing records; the agency is not obligated to create 'new' records for the convenience of the requester."

OIP Op. Ltr. No. 90-35 at 9 (Dec. 17, 1990) (emphasis added; footnote in original omitted). So long as an agency maintains a record in the format requested by a UIPA requester, the agency must provide a copy in the format requested by the public unless doing so might significantly risk damage, loss, or destruction of the original records. Id. at 13.

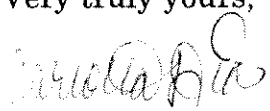
The OIP again discussed section 92F-11(c), HRS, in OIP Opinion Letter No. 92-7. The OIP found that government agencies are not required to create new records in response to a UIPA request unless that data can be "routinely compiled" given the agency's programming capabilities. OIP Op. Ltr. No. 92-7 at 10-12 (June 29, 1992). In the facts of that Opinion, the information requested was readily retrievable from existing electronic records, and the OIP recommended the agency make the information available after deleting information to which significant privacy interest attached. Id. at 12.

[8] A "formal request" means "a request that is in written, electronic, or other physical form that a person submits to an agency for access to records and that contains the information prescribed by section 2-71-12(b)." Haw. Admin. R. § 2-71-2 (1999).

[9] An "informal request" means "a request, in any form, that a person submits to an agency for access to records and to which the agency responds in accordance with section 2-71-11." Haw. Admin. R. § 2-71-2 (1999).

Section 11-97, HRS, requires that The Public List be public. The Public List must, therefore, be available for inspection *and* copying during regular business hours. Haw. Rev. Stat. § 92F-11(b) (1993). Lastly, the UIPA does not require agencies to create records where none exist, unless the information is readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993).

Very truly yours,



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