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@hawaii.gov
WEBSITE: www.hawaii.gov/oip

May 3, 2004

The Honorable Brian T. Moto
Corporation Counsel, County of Maui
Department of the Corporation Counsel
200 South High Street
Wailuku, Hawaii 96793

Re: Anonymous Testimony and Liability for Disclosure of Records Containing Defamatory Statements

Dear Mr. Moto:

This is in response to then Deputy Corporation Counsel Richard K. Minatoya's request to the Office of Information Practices ("OIP") for an opinion on certain issues regarding anonymous testimony before the Maui County Council ("Council") and on whether an agency or agency employee is immune from liability under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), for disclosing records containing defamatory statements.

ISSUES PRESENTED

I. Whether the Council and its committees may require that individuals identify themselves in written and oral testimony, and may refuse to accept anonymous testimony.

II. Whether the good faith defense to liability in section 92F-16, HRS, applies to disclosure of anonymous testimony that may be defamatory.

BRIEF ANSWER

I. No. The "Sunshine Law" at part I of chapter 92, HRS, requires that "all interested persons" be given the opportunity to provide written and oral testimony on agenda items. Haw. Rev. Stat. § 92-3 (1993). Because "all interested persons" are allowed to submit testimony under the Sunshine Law, in keeping with the Sunshine Law's policy of liberally construing its provisions in favor of openness, it is not appropriate to condition submission of testimony on whether a potential testifier identifies himself or herself. Because boards "shall" allow interested persons the opportunity to submit testimony, they do not have authority to refuse anonymous testimony.

II. Yes. The UIPA requires that government records be public, unless access is closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). Written testimony received by a board at a public meeting is public, and copies of such testimony should be made available upon request. Because we are of the opinion that the UIPA requires agencies to disclose public testimony upon request, we believe that section 92F-16, HRS, provides agency employees with immunity from criminal or civil liability for such disclosures. We note, however, that section 92F-16, HRS, has never been tested in court.

DISCUSSION

I. PERSONS NEED NOT IDENTIFY THEMSELVES WHEN TESTIFYING, AND BOARDS AND THEIR COMMITTEES MAY NOT REFUSE TO ACCEPT TESTIMONY FROM PERSONS WHO DO NOT IDENTIFY THEMSELVES

The Sunshine Law requires that boards allow oral and written testimony on all agenda items:

> The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item.

Haw. Rev. Stat. § 92-3 (1993) (emphasis added). The Sunshine Law does not, however, provide more detailed instruction regarding testimony, other than allowing boards to "provide for reasonable administration of oral testimony by rule." Id.

The legislature has declared that the provisions of the Sunshine Law requiring open meetings shall be liberally construed. Haw. Rev. Stat. § 92-1(2) (1993). Based on this legislative intent, we liberally construe section 92-3, HRS, and decline to read into the statute a requirement that a person identify himself or herself before being allowed to testify. Moreover, a contrary interpretation may deter some interested persons from testifying at all. Because section 92-3, HRS, clearly requires that all interested persons be given the opportunity to testify, to prohibit persons who do not identify themselves from testifying goes against both the legislature's declaration and the intent of the Sunshine Law. We therefore opine that boards may not require potential testifiers to identify themselves prior to submitting oral or written testimony and cannot refuse to accept written or oral testimony from a member of the public who chooses not to identify himself or herself.

II. IMMUNITY FROM LIABILITY

You also raise the question whether the good faith provision in section 92F-16, HRS, protects the Council, the County, and County employees from liability for defamation arising from the disclosure of testimony submitted to the Council by a member of the public. To answer your question, the OIP must first consider whether the defamatory statements contained in written testimony received by the Council are subject to disclosure under the UIPA.

The UIPA governs public access to State and county government agency[1] records[2]. The UIPA operates on the presumption that records maintained by a State or county agency are public. Haw. Rev. Stat. § 92F-11(a) (1993). The statute contains five exceptions to disclosure, two of which may be applicable to the present issue. For board meetings that are open to the public[3], anyone in attendance at the meeting will be able to hear

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[1] "Agency" is defined to include County Councils. Haw. Rev. Stat. § 92F-3 (1993).

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

[3] Most meetings of boards are required to be open to the public. If certain conditions are met, boards may hold meetings closed to the public. See Haw. Rev. Stat. §§ 92-3.1, 92-4, 92-5 (Supp. 2003, and 1993).

oral testimony. Accordingly, the OIP finds no basis for boards to withhold public access to written testimony that was read at a public meeting on the basis that disclosure would be a clearly unwarranted invasion of personal privacy, because the testimony has been put into the public domain by the testifier. The testifier thus has no reasonable expectation of privacy. Haw. Rev. Stat. § 92F-13(1) (1993).

There may be instances when a board receives written testimony that is not read aloud by the testifier at a public meeting. We find that individuals submitting testimony to a board for an open meeting agenda item do not have a cognizable privacy interest in their testimony because it is not reasonable to assume that their testimony will not be considered in a meeting open to the public. We therefore find that, in ordinary circumstances, written testimony submitted to a board on an agenda item of an open meeting does not implicate the testifier's privacy interest and is not protected from disclosure under section 92F-13(1), HRS.[4]

Section 92F-13(3), HRS, allows agencies to withhold records if disclosure would cause the frustration of a government function. Because boards conduct business in open meetings, the OIP finds that testimony on public meeting agenda items must, under normal circumstances, be considered at an open meeting. Because individuals submitting testimony cannot reasonably expect otherwise, their access to and participation in open meetings are not "chilled" by disclosure. Boards, therefore, cannot invoke the frustration exception for testimony submitted on a public agenda item.

The UIPA states that "anyone 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). Because we are of the opinion that the UIPA requires generally that written testimony received by the Council is public, we believe that agencies must disclose such testimony upon request. We therefore believe that section 92F-16, HRS, provides the Council, the County, and the County employees with immunity from liability for such disclosures. Further, because the OIP is charged with administering the UIPA, we are of the opinion that it is an act of good faith under section 92F-16, HRS, to consult with the OIP when an agency is uncertain whether disclosure of a government record is appropriate.

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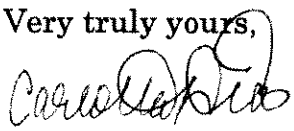
[4] It may be appropriate to segregate home addresses, home telephone numbers, and personal email addresses from written testimony that is not read aloud at an open meeting.

CONCLUSION

The Sunshine Law requires that "all interested persons" be given the opportunity to provide written and oral testimony on agenda items. Haw. Rev. Stat. § 92-3 (1993). The Council and its committees, therefore, may not require that individuals identify themselves in written and oral testimony, nor may they refuse to accept anonymous written or oral testimony.

Written testimony received by a board at a public meeting is public, and copies of such testimony should be made available upon request. Because the UIPA requires generally that written testimony received pursuant to public meetings is public, agencies must disclose such testimony upon request. The good faith defense to liability in section 92F-16, HRS, applies to disclosure of anonymous testimony that may be defamatory. We note, however, that section 92F-16, HRS, has never been tested in court.

Very truly yours,



Carlotta Dias
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CMD:ankd

cc: Ken R. Fukuoka
Director of Council Services, County of Maui