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June 30, 2004

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

Re: Personal Information of Petition and Nominating Paper Signatories

Dear Mr. Konishi:

In a letter dated May 22, 1998, Mr. Donald Ikeda, then the Hawaii County Clerk, requested an opinion from the Office of Information Practices ("OIP") regarding whether the public has a right to inspect and copy petitions which contain personal information of signers under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"). Mr. Ikeda requested the opinion specifically with respect to initiative and charter amendment petitions and candidate nominating papers, all of which require signatories to include personal information with the signature. Mr. Ikeda also raised as a concern the fact that the personal information (which includes social security numbers) is collected by petitioners, not government employees. In his letter requesting OIP's opinion, he wrote that "it has not been our office's experience that petitioners comply with disclosure requirements imposed <u>on public agencies</u> contained in 5 USCS Section 552(e)(3), which we understand to require in part that a person must be informed in writing on agency forms that the person's social

security number may be released." You subsequently clarified by telephone that you did wish the request for OIP's opinion to include the issue of whether collection of social security numbers in the petition process was proper.

ISSUES PRESENTED

I. Must the names, home addresses, social security numbers, and dates of birth of petition or nominating paper signatories be released in response to a UIPA request?

II. Does the UIPA prevent the County Clerk from requiring petitioners to collect social security numbers from signatories, as required by the Hawaii County Charter for initiative or referendum petitions and by the HRS for candidate nominating papers?

BRIEF ANSWERS

I. No. The County Clerk may withhold signatories' street addresses, social security numbers, and dates of birth, based on the UIPA's privacy exception, section 92F-13(1), HRS.

II. No. The UIPA does not specifically address what information may be collected by a government agency. However, the requirement that petitioners collect social security numbers may be imputed to the county or the State, and may violate either the federal Privacy Act or the federal Constitution or both. OIP therefore advises the County Clerk to consult with Corporation Counsel regarding whether it should enforce the social security number collection requirements.

FACTS

Hawaii County requires initiative and charter amendment petitioners to collect information from petition signatories, as set out in sections 11-4(b)(4) and 15-1(b), Hawaii County Charter: names, signatures, home addresses, social security numbers, and dates of signing the petition. Section 12-3(a)(5), HRS, requires nominating paper signatories to provide similar information: names, signatures, dates of birth, social security numbers, and home addresses. The petitioners who collect signatures are not government employees, and do not generally provide signatories with any type of notice regarding whether collection of the social security numbers is mandatory or voluntary, or what use may be made of the social security numbers.

DISCUSSION

I. STATUTORY LIMITATION ON RELEASE OF VOTER INFORMATION

Section 11-97(a), HRS, provides that "[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." The personal information provided by petition signatories includes categories of information that are also provided by registered voters on the voter registration affidavit. However, the information on the petitions is provided directly by the signatories themselves, rather than being taken from the voter registration affidavits. In this context, section 11-97(a)'s limitation on public access to voter information is subject to two possible interpretations. The first would be that the statute does not directly address information not directly taken from the voter registration affidavit, although it may indicate a legislative intent that personal information about voters (of the sort collected in the affidavit) be nonpublic except as provided. The other possible interpretation would be that the statute does directly bar the public release of information provided on the voter registration affidavit regardless of whether a request is for the voter registration affidavit itself (including databases or other records based on the affidavits) or a different record, e.g. the petitions that includes the same information.

II. PRIVACY EXCEPTION TO UIPA

We find it unnecessary to determine whether section 11-97(a), HRS, directly addresses the information provided on the voter registration affidavit when it is provided as part of a different record, because the UIPA's privacy exception would apply in any case here. See Haw. Rev. Stat. § 92F-13(1) (1993). Even assuming the statute to be limited in its direct application to personal information provided on the voter registration affidavit only, it is in pari materia[1] with the UIPA's privacy exception as regards public access to personal information about voters. Thus, we construe section 11-97(a), HRS, together with the UIPA's privacy exception in determining whether voter

[1] "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." Haw. Rev. Stat. § 1-16 (1993).

information found on petitions and candidate papers and carrying a significant privacy interest is required to be public. Section 11-97(a), HRS, at a minimum indicates a legislative intent that such information about voters not be publicly available, and thus supports the conclusion that the public interest in the information does not outweigh voters' significant privacy interest.

A. Public Interest in Signatories' Personal Information

If the public interest in disclosure outweighs the privacy interest of an individual, then disclosure of a record is not an unwarranted invasion of personal privacy. Haw. Rev. Stat. § 92F-14(a) (1993). The public interest, as the term is used in the UIPA, means the interest in shedding light on how government works. See OIP Op. Ltr. No. 99-6 at 4 (Oct. 25, 1999). In this case, the public interest is in understanding how the clerk (or chief election officer, in the case of nominating papers) is performing the duty of checking and certifying petitions or nominating papers. This public interest would be served by public access to information about signatories that would allow members of the public to compare signatories to the publicly available voter information – name, district/precinct designation, and status. However, information about signatories beyond the publicly available voter information would not significantly serve the public interest in knowing how the clerk is performing the duty of checking and certifying petitions and nominating papers. Under section 11-97(a), HRS, the public does not have access to all the information on voter rolls, so greater access to signatories' personal information would not enable members of the public to check the validity of signatures with the same accuracy as the clerk (who does have access to the nonpublic voter roll information). In the absence of special access to voter roll information (such as through a formal challenge process entitling a challenger to discovery), a member of the public can raise questions about the validity of signatures, but cannot definitively answer those questions.

1. Public Challenge to Petition Certification

Charter sections 11-5(a) and 15-1(b) require the clerk to determine the validity of either an initiative or a charter amendment petition within 20 days of its filing. There is no provision in the charter for individual voters to formally challenge a petition, either before or after the clerk determines its validity. Although individual voters could presumably raise questions about the validity of petition signatures to the clerk before the clerk certifies a petition, the window of opportunity to do so is very short. The lack of formal public challenge process combined with the short time frame for the clerk to

certify indicates that the public's scrutiny of a petition will likely come after certification; however, we note that the public may still, prior to the election, raise concerns about whether petition truly had adequate public support. Although publicly airing such doubts would not result in removal of petition question from ballot, it might well result in voter rejection of the initiative or proposed charter amendment at the polls.

2. Public Challenge to Nomination Papers

As for nominating papers, "[a]t the time of filing, the chief election officer or clerk may reject the candidate's nomination paper for lack of sufficient signers who are eligible to vote for the candidate." Haw. Rev. Stat. § 12-4(b) (Supp. 2003). This provision is the only one specifically addressing rejection based on the number of signatories; however, section 12-8, HRS, allows a voter to object to a nomination filing.

Section 12-8, HRS, does not specify what grounds may form the basis for an objection. The number of eligible signatories required for candidate nomination papers is minimal compared to the number of potential voters for an office[2], but because the signatures are required, their validity would seem to be a possible basis for challenge to candidate nominating papers. However, there is no apparent role for an objecting voter beyond the objection itself. The candidate is notified of the objection, but the County Clerk's or Chief Election Officer's decision on the objection is specifically not intended to be a contested case hearing. Haw. Rev. Stat. § 12-8(b)-(d) (Supp. 2003). The County Clerk or Chief Election Officer has a deadline of 5 working days from when the objection is filed to make his or her preliminary decision. Haw. Rev. Stat. § 12-8(d) (Supp. 1993). If the decision is that the objection may warrant disqualification of the candidate, the County Clerk or Chief Election Officer -- not the objecting voter -- is to file a circuit court complaint; if the decision is that there is no problem, then the statute provides no avenue for the objecting voter to appeal the decision or take the objection to circuit court. See Haw. Rev. Stat. § 12-8 (Supp. 1993). Thus, notwithstanding the provision specifically permitting a voter to object to nominating papers and have the objection considered, there seems to be no statutory authority for

[2] Twenty-five signatories are required to nominate a candidate for the U.S. Congress, for Governor, for Lieutenant Governor, or for a seat on the Board of Education or the Board of Trustees of the Office of Hawaiian Affairs, while 15 signatories are required to nominate a candidate for the State Legislature. Haw. Rev. Stat. § 12-5 (1993).

the objecting voter to act as, essentially, a party in interest entitled to special access to voter information to support the objection. See id. We note also that the extremely short window for decision by the clerk or chief election officer leaves no apparent opportunity for an objecting voter to present arguments in support of the objection.

B. Signatories' Significant Privacy Interest is Not Outweighed

For both nominating papers and petitions, a member of the public could raise questions either informally or as part of an objection, but the respective statutory and Charter schemes indicate that it is the County Clerk or Chief Election Officer who is expected to answer those questions without input from the voter (or the candidate, in the case of nominating papers). The role of a member of the voting public is not substantially different from one process to the other. In both cases, there is no apparent provision for a member of the public to obtain special access to otherwise private voter roll information to challenge signatures, so information about signatories that is not publicly available as voter roll information would not significantly assist the public in understanding how the clerk is performing the duty of checking and certifying petitions and nomination papers. Thus, construing section 11-97(a), HRS, and the UIPA together, OIP concludes that the public's access interest under the UIPA in obtaining signatory information to compare to voter roll information extends only to the voter roll information that is publicly available – that is to say, voter name, district/precinct, and status.

An individual's home address, date of birth, and social security number all carry a significant privacy interest. E.g. OIP Op. Ltr. No. 01-03 at 6 (Sept. 17, 2001) (social security numbers and birth dates); OIP Op. Ltr. No. 03-04 at 6 (April 8, 2003). Under section 11-97(a), HRS, the public has access to a voter's full name, district/precinct designation, and voter status from the voter rolls. Thus, knowing a signatory's home address would assist members of the public in checking whether it matched the district or precinct of record for a particular voter. However, a home address is much more specific and reveals more than a district or precinct designation. We therefore look at the elements of a home address to determine which elements carry a significant privacy interest that is not outweighed by the public interest in disclosure. A house or apartment number is the most specific pointer to a home's actual location, and is obviously much more specific than a district or precinct designation. A street name, without the house number, may reveal little about the location of a home along a major thoroughfare, but many streets are small enough that the street name by itself is likely to reveal the home's

location. The street name, as well as the house or apartment number, therefore carries a significant privacy interest. As for the public interest, the street name would assist the public in narrowing down a signatory's district or precinct designation, but other, less private, address information is also available to indicate a signatory's possible district or precinct designation. A town of residence or a zip code, without a specific street address, does not carry a significant privacy interest and would still narrow down the districts or precincts in which a voter may be located. Balancing the significant privacy interest in home address information against the public access interest, OIP concludes that a signatory's street address and house or apartment number may be withheld under the UIPA's privacy exception, but that the signatory's town and zip code, which are roughly equivalent to the district or precinct designation, must be made public.

A signatory's social security number and date of birth allow the County Clerk to compare signatories to registered voters on the voter rolls and, for instance, confirm based on matching the date of birth or social security number that a signatory whose address has changed since the last election is in fact a registered voter. Members of the public would not be able to use the social security number or the date of birth to verify voter status in the same way, as members of the public do not have access to the social security numbers or the dates of birth of registered voters. Thus, signatories' social security numbers and dates of birth would not aid the public in determining voter status of signatories, so the public access interest does not outweigh the signatories' significant privacy interest in this information.

To summarize, it is OIP's conclusion that signatories' social security numbers and dates of birth may be withheld under the UIPA's privacy exception, section 92F-13(1), HRS. Signatories' street addresses and house or apartment numbers may also be withheld, but the town of residence and zip code, which are roughly equivalent to their district or precinct, must be disclosed.

III. OTHER POSSIBLE EXCEPTIONS TO DISCLOSURE

As we noted above, it is possible that section 11-97(a), HRS, could be read to directly prohibit release of voter information that is included in voter registration affidavits no matter what record the information is in, including petitions and nominating papers. If so, that information could be withheld

under section 92F-13(4) of the UIPA, which allows withholding records when their release would violate another statute. As the County Clerk's office pointed out in its request, there is also an argument for withholding the information under section 92F-13(3) of the UIPA, the exception for information whose disclosure would frustrate a legitimate government function, based on the potential chilling effect on petition or nomination signatories if their support of a petition or a candidate meant that otherwise private information was required to be publicly available. OIP need not determine whether these exceptions would also apply, because OIP has already determined that signatories' personal information may be withheld under section 92F-13(1), HRS, the privacy exception. However, we note that concerns about the potential chilling effect on political participation of public release of private information (such as a social security number) have been addressed by courts as a burden on the right to vote. E.g. Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993).

IV. COLLECTION

The County Clerk has also asked for OIP's opinion regarding whether the required collection of social security numbers from petition signatories is in violation of section VII of the Federal Privacy Act of 1974, Public Law 93-579, Title 5 U.S.C. § 552a or of the UIPA. We note that OIP is required to "adopt rules which set forth uniform standards for the records collection practices of agencies. . . ." Haw. Rev. Stat. § 92F-42(14) (Supp. 2003). OIP's collection rules as required under the UIPA have not yet been adopted, so at this time there are no rules specifically governing collection of information for UIPA purposes; however, OIP generally advises agencies to avoid collecting unnecessary information.

Interpretation of the Privacy Act itself is beyond OIP's jurisdiction, but we note that the County Clerk's concerns regarding collection of social security numbers find support in federal case law. Although the actual collection of social security numbers is done by the individuals collecting petition signatures rather than by employees of the County Clerk's office, a government agency may be held responsible for a private entity's collection of social security numbers when that collection was sufficiently fostered or encouraged by government. Yeager v. Hackensack Water Company, 615 F. supp. 1087(D.N.J. 1985). More specifically, at least one court has held that the requirement that a petition signatory include his or her social security

number violates section VII of the Federal Privacy Act of 1974, Public Law 93-579, Title 5 U.S.C. § 552a. Libertarian Part of Kentucky v. Ehrler, 776 F. Supp. 1200, 1209 (E.D. Ky. 1991); see also Schwier v. Cox, 340 F. 3d 1284 (11th Cir. 2003) (Appeals court held that Privacy Act applied to Georgia's collection of social security numbers in voter registration, and remanded for determination of factual issues regarding whether that collection violated the Privacy Act); McKay v. Altobello, 1997 U.S. Dist. LEXIS 7162 at *7 (E.D. La. 1997) (Louisiana commissioner of elections enjoined based on Privacy Act from requiring voters to provide social security numbers as a condition of voter registration). Collection of social security numbers or voter registration numbers has also been held to unconstitutionally burden participation. See Greidinger, supra; see also Austinites for a Little Less Corruption v. City of Austin, Texas, 1997 U.S. Dist. LEXIS 22593 at *8-*12 (W.D. Tex. 1997) (requirement that initiative petition signatories include voter registration number unconstitutionally burdened initiative process).

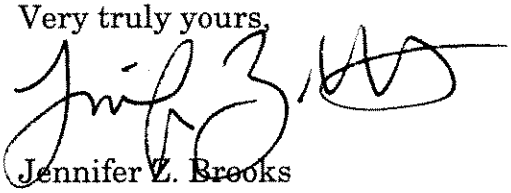
Thus, it is OIP's opinion that the UIPA itself does not directly address collection of social security numbers until OIP's collection rules are formally adopted. Nonetheless, because the issue of collection has been placed within OIP's jurisdiction for the purpose of adopting rules, we advise the County Clerk that there is federal case law indicating that the collection of social security numbers from petition signatories may violate the Privacy Act or even the U.S. Constitution. For this reason, we advise the County Clerk to consult with the Corporation Counsel to determine whether it may legally cease enforcing the required collection of social security numbers from petition and candidate nominating paper signatories.

CONCLUSION

The UIPA's privacy exception allows the County Clerk to withhold petition and nominating paper signatories' street addresses and house or apartment numbers, social security numbers, and dates of birth from public access. The UIPA does not bar collection of signatories' social security numbers; however, the required collection of social security numbers may violate the federal Privacy Act or the federal Constitution or both, and OIP advises the County Clerk to consult with Corporation Counsel regarding whether it must enforce the requirement that social security numbers be included with petition signatures.

If you have further questions about this matter or the UIPA in general, please do not hesitate to contact OIP.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

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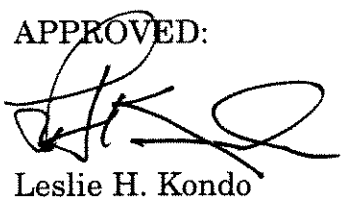

Leslie H. Kondo
Director

JZB:ankd