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LESLIE H. KONDO
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October 27, 2004

Mr. Stirling Morita
Night Editor
Honolulu Star-Bulletin
500 Ala Moana Boulevard, Suite 500
Honolulu, Hawaii 96813

Re: Calendars and Telephone Message Slips of City Officials (RFO 02-013)

Dear Mr. Morita:

This letter responds to the request by the Honolulu Star-Bulletin (the "Star-Bulletin") to the Office of Information Practices (the "OIP") for an opinion regarding disclosure of the above-referenced records under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") (the "UIPA"). Specifically, we have construed the request to raise the following issue: Whether personal appointment or scheduling calendars (the "Calendars") and telephone message slips of certain current and former officials of the City and County of Honolulu (the "City") are government records subject to disclosure under the UIPA.

We understand the relevant facts underlying the issue presented above to be as follows. On September 10, 2002, the Star-Bulletin made a request for copies of (1) the scheduling calendars and (2) the telephone logs for Mayor Jeremy Harris, Managing Director Ben Lee, Deputy Managing Director Malcolm Tom, Department of Design and Construction Director Rae Loui, former Design and Construction Department Director Randall Fujiki, former Budget Director Carroll Takahashi, and former Finance Director Roy Amemiya (collectively the "City Officials") for the period beginning January 1, 1997 until the date of the request. The Star-Bulletin made an additional request on September 19, 2002 to inspect and copy the appointment calendar of the Mayor for the period beginning May 1, 2002 until the date of the request "including future activities."

The City denied both requests by letters dated October 8, 2002,[1] stating that among other reasons: (1) the Calendars are not government records as defined by section 92F-3, HRS; (2) the disclosure of the Calendars and telephone logs would be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS; and (3) the records must be confidential in order to avoid the frustration of a legitimate government function pursuant to section 92F-13(3), HRS. By letter dated October 10, 2002 and subsequent correspondence, the Star-Bulletin requested an opinion from the OIP regarding the City's denial of the Star-Bulletin requests.

The City subsequently informed the OIP by letter dated August 7, 2003 that, upon inquiry, Verizon stated that it purges the database record of the telephone calls to the City regularly due to the volume of calls received, and thus that the database record maintained only consists of the most recent month's calls. Further, the City stated that because of the configuration of the database neither the City nor Verizon could collate the database to determine the telephone numbers called from a specific telephone.

Based upon these representations, the OIP informed the Star-Bulletin by letter dated August 18, 2003 that it considered the issue regarding disclosure of the telephone logs moot. The Star-Bulletin, in response, stated that it also sought the telephone message slips of the City Officials. The Star-Bulletin request thus clarified included the Calendars of the City Officials, excluding the Mayor, from January 1, 1997 through September 10, 2002; the Calendar of the Mayor from January 1, 1997 through September 19, 2002 including future activities; and the telephone message slips of the City Officials from January 1, 1997 through September 10, 2002.

In response to an OIP request for a sampling of the records in question and after consultation with the OIP, the Department of the Corporation Counsel ("Corporation Counsel") sent surveys to the City Officials regarding their creation, maintenance and use of the Calendars and the telephone message slips (the "Surveys"). The Corporation Counsel thereafter provided the OIP with supplemental letters, both dated March, 5, 2004, setting forth the bases of the City's denial of the Star-Bulletin requests and including in support summaries of the responses received from the City Officials to the Surveys (the "Survey Summaries").

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[1] We note that when an agency intends to deny access to all or part of the information in the requested record, the agency must provide notice to the requester within ten business days of receipt of the request. Haw. Admin. R. §§ 2-71-13(b)(1), 2-71-14(b)(1). By copy of this letter to the City, we remind the City of this requirement.

With respect to the Calendars, the City provided the following summary of survey responses:

1. The City Officials are not required by any law or by rules of their City agency to maintain a personal calendar as part of their public responsibilities.
2. The City Officials' scheduling calendars are not under control of their City agency because:
   a. The City agency cannot require the City Officials to keep a scheduling calendar.
   b. The City Officials' scheduling calendars are not filed in or placed in the City agency's files.
   c. The City agency cannot prevent the City Officials from destroying their scheduling calendars because the City Officials have sole discretion to discard their scheduling calendars, and can discard the scheduling calendars at their own convenience.
   d. The City Officials' scheduling calendars are maintained privately, with access limited to only each City Official and his or her secretary.
   e. Copies of the City Officials' scheduling calendars are not circulated or intended for distribution to other agency employees or within agency channels, and the City Officials' scheduling calendars are not created for the express purpose of informing other staff as to their whereabouts during the course of the day to determine availability for meetings.
3. The City Officials do not maintain a private appointment calendar and a public appointment calendar that are accessible to the public or members of the City agency's staff.
4. The City Officials' scheduling calendars are not created solely for the purpose of conducting official agency business, but include a mix of personal and business entries and are created solely for the City Officials' personal convenience to organize personal affairs and business appointments.
5. Some City Officials purchased their own scheduling calendar, while some had their scheduling calendar purchased with City funds.
6. Some City Officials kept a paper copy of their scheduling calendars, while some kept their scheduling calendar on a computer.

With respect to the telephone message slips, the City provided the following summary of the survey responses:

1. The City Officials are not required by any law or by rules of their City agency to maintain telephone message slips as part of their public responsibilities.
2. The City Officials' telephone message slips are not under control of their City agency because:
    a. The City agency cannot require the City Officials to keep telephone message slips.
    b. The City Officials' telephone message slips are not filed in or placed in the City agency's files.
    c. The City agency cannot prevent the City Officials from destroying their telephone message slips because the City Officials have sole discretion to discard their telephone message slips, and can discard the telephone message slips at their own convenience.
    d. The City Officials' telephone message slips are maintained privately, with access limited to only each City Official and his or her secretary.
    e. Copies of the City Officials' telephone message slips are not circulated or intended for distribution to other agency employees or within agency channels, and the City Officials' telephone message slips are not created for the express purpose of informing other staff of phone calls received during the course of the day.
3. The City Officials do not maintain a private telephone message slip book and a public telephone message slip book that are accessible to the public or members of the City agency's staff.
4. The City Officials' telephone message slips are not created solely for the purpose of conducting official agency business, but include a mix of personal and business entries and are created solely for the City Officials' personal convenience so that they can return both personal and business telephone calls.
5. Some City Officials purchased their own telephone message slip books, while some had their telephone message slips purchased with City funds.

We note that the OIP has not reviewed the Calendars or the telephone message slips requested nor the actual responses to the Surveys. We are, thus, precluded from opining specifically on the records requested and, instead, provide the following general opinion based upon the Survey Summaries for application by the City to the records requested.

The UIPA only directs the disclosure of "government records." See Haw. Rev. Stat. § 92F-11(a) (1993) ("All government records are open to public inspection unless access is restricted or closed by law"). The threshold question before us, thus, is whether the Calendars and the telephone message slips of the City Officials constitute "government records" under the UIPA.

The UIPA defines "government record" to mean "**information maintained by an agency** in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993) (emphasis added). In the absence of a definition of "maintain" in the UIPA, the OIP has previously looked for guidance to the Uniform Information Practices Code (the "Model Code"), which defines "maintain" broadly to mean "hold, possess, preserve, retain, store or administratively control." Model Code § 1-105(6) at 7 (1980).[2] See OIP Op. Ltr. No. 91-5. We believe the legislative history to the UIPA makes clear that the legislature expanded the definition of "government records" to be "all-inclusive"[3] in order to encompass a far broader scope of records than that covered by the more restrictive definition of former section 92-50, HRS, contained in the public records law that preceded the UIPA. See S. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988)(new definition of "public record' was expanded beyond the definition in the former section 92-50 to address modern storage technologies, to remove the exclusion for "records which invade the right of privacy of an individual[,]" and to delete the words "by law" to specifically reject the requirement that, in order to be a public record, an entry must be made, or be required to be made, in or on the record by law). H. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 970 (1988) (indicating the need to resolve conflicting definitions in the state open government laws, which conflicts led to the conclusion that the public records law gave primacy to personal privacy interests).

We do not find it reasonable to believe, however, that the legislature intended this expanded definition to mean that every piece of information in physical form possessed by an agency official within an agency's confines is "information maintained by an agency."[4] Nothing in the UIPA, its legislative

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[2] The Commentary to this section states in part: "'Maintain' is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by the agency." Commentary to Model Code §1-105 at 9 (1980).

[3] S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

[4] See generally Bureau of Nat'l Affairs, Inc. v. United States DOJ, 742 F.2d 1484, 1493 (D.C. Cir. 1984) (question is "whether the document is in fact an 'agency record' and not an employee's record that happens to be located physically within an agency") (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157 (1980)).

history, or the Model Code suggests an interpretation that would preclude the finding of such a record to be a personal document of an agency official.[5]

Because we believe it to be consistent with the definition of "government record" under the UIPA and its legislative history to distinguish between records held by an agency official in his or her personal capacity versus official capacity, we find, in line with the number of other state and federal courts that have similarly construed other open records laws, that the determination of whether or not a record is a "government record" under the UIPA or a personal record of an official depends on the totality of circumstances surrounding its creation, maintenance and use.[6] See Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich, 654 N.E.2d 139 (Ohio Ct. App. 1995);[7] Wick Communs. Co. v. Montrose County Bd. of County Comm'rs, 81 P.3d 360 (Colo. 2003);[8] Bloomberg, L.P. v. United States Securities and Exchange Commission,

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[5] See Bureau of Nat'l Affairs, 742 F.2d at 1491 ("The fact that the head of the Department controls the record does not mean that the record is automatically a departmental record. If that were the case, the distinction between the personal papers of the Secretary and the agency's papers would be obliterated." (quoting Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229 (N.D. Ill. 1982)).

[6] We note that our broad survey of cases from other jurisdictions showed that a number of courts also allowed the withholding of private and public calendars or telephone records for other reasons, including specific provisions of their respective open records laws. See, e.g., Times Mirror Co. v. Superior Court, 813 P.2d 240 (Cal. 1991) (governor properly withheld his appointment calendars and schedules produced by, and circulated to, staff because these records fell within statutory exemption that allows withholding records where the public interest in not disclosing the records clearly outweighs the public interest in disclosure); N. J. Newspapers v. Passaic County, 601 A.2d 693 (N.J. 1992) (generally, county officials' telephone toll records not required to be kept were not public records under state statute that allowed unrestricted access to records of government action "required by law to be made, maintained or kept on file"); Courier-Journal v. Jones, 895 S.W.2d 6 (Ky. Ct. App. 1995) (governor's appointment schedule could be withheld from disclosure as a preliminary draft of the governor's schedule and applying logic of Times Mirror balancing the interests of the public in disclosure versus nondisclosure); Kerr v. Koch, 1988 N.Y. Misc. LEXIS 874 (N.Y. Sup. Ct. 1988) (Mayor's appointment schedules likely become agency records where distributed to staff and, if not, are agency records due to the intermingling of personal and government information under statute which deemed "intermingled" files to be such).

[7] The Ohio court found the governor's personal calendars not to be public records because they were not required to be maintained, were not circulated for official purposes, were not used to document official activities or functions within the office, and because the calendars were maintained solely by the governor and could be discarded by him at any time.

[8] The Colorado court found that the requester failed to make a threshold showing that a private diary was likely a public record where evidence showed that county manager made the diary in his individual capacity, diary was not maintained by the county, diary was not used in the daily functioning of the office, county did not require county manager to keep the diary, and county never attempted to exercise control over the diary.

2004 U.S. Dist. LEXIS 15111 (D.D.C. 2004);[9] Bureau of Nat'l Affairs, Inc. v. United States DOJ, 742 F.2d 1484 (D.C. Cir. 1984). Cf. Herald Ass'n, Inc. v. Dean, 816 A.2d 469 (Vt. 2002);[10] Yacobellis v. Bellingham, 780 P.2d 272 (Wash. App. 1989), *overruled, in part, by* King County v. Sheehan, 57 P.3d 307 (Wash. App. 2002) and cases cited therein;[11] Office of the Governor v. Washington Post, 759 A.2d 249 (Md. 2000).[12] As reflected in these cited cases, courts have distinguished personal papers, such as personal scheduling calendars and telephone message slips, from public records where they "are generally created solely for the individual's convenience or to refresh the writer's memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion." Yacobellis v. Bellingham, 780 P.2d at 275.

This office has been provided with a summary of the City Officials' representations that their Calendars and the telephone message slips are not required to be kept or maintained to document their official functions but are created solely for their personal convenience; are not circulated or intended for distribution within agency channels for official purposes, such as notifying others of their schedules; are not integrated into agency files but are maintained in a way indicating a private purpose with limited access by their respective

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[9] The U.S. District Court for the District of Columbia found the SEC Chairman's personal calendar, telephone logs and telephone message slips not to be "agency records" subject to disclosure under the federal Freedom of Information Act (FOIA). The court looked to the totality of the circumstances focused upon by the D.C. Circuit: "(1) the intent of the creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." Id. at 15114.

[10] The Vermont court found that although kept by the choice of the governor, his daily calendar was, under the circumstances, a public record, defined as a record "produced or acquired in the course of agency business." The circumstances showed that it was prepared by staff and played an essential role in the day-to-day functioning of his office, being comprehensive in design to facilitate the execution of the Governor's various duties and to communicate with staff and security personnel.

[11] The Washington court distinguished surveys prepared and responded to by government agencies, which they found to be public records because they evidenced the final knowledge obtained by the agency, from personal notes, telephone messages and daily appointment calendars, which they noted the cases consistently hold are not public records.

[12] The Maryland court found bills or records of personal telephones of the governor's mansion to be "private" records versus those of a "government instrumentality," which distinction ordinarily determined cover of its information act, and found that appointment schedules prepared by staff and circulated to state troopers and staff to be public records subject to redaction for executive privilege where privilege was demonstrated.

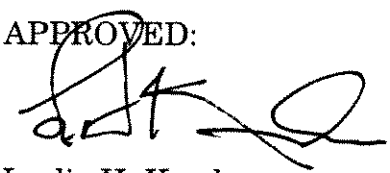
secretaries; are not under agency control; and may be discarded at their sole discretion. Based upon these representations, we find generally that the totality of the circumstances surrounding the creation, maintenance and use of the Calendars and the telephone message slips show them to be held by the City Officials in their individual rather than official capacities.

Accordingly, it is our general opinion that the Calendars and the telephone message slips are personal records of the City Officials and not "government records" subject to disclosure under the UIPA.[13] The City's denial of the Star-Bulletin requests are thus outside the purview of the UIPA and the jurisdiction of this office.

Very truly yours,

Cathy L. Takase
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

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cc: Rick Daysog, Reporter, Honolulu Star-Bulletin
Gordon Pang, Reporter, Honolulu Advertiser
Reid Yamashiro, Deputy Corporation Counsel

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[13] It is incumbent upon the City to ensure review of the requested records and to apply this opinion based upon the circumstances surrounding each record. For example, where a telephone message slip has been placed into an agency file to document an agency telephone call, it clearly becomes an agency record.