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April 20, 2005

VIA FACSIMILE - 587-0830

The Honorable Marion M. Higa
State Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, HI 96813

Re: Charter Schools
RFO-G (05-007)

Dear Ms. Higa:

The Office of Information Practices ("OIP") received your request to reconsider OIP Opinion Letter No. 03-01 ("03-01"), which concluded that new century charter schools and new century conversion charter schools (collectively "charter schools") are exempt from the Open Meetings Law, part I, chapter 92, Hawaii Revised Statutes ("HRS"), otherwise known as the Sunshine Law. We respond as follows and, based upon the information that you provided, have also reconsidered OIP Opinion Letter No. 03-10 ("03-10"), which concluded that charter schools are also exempt from the public records law, the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA").

ISSUES PRESENTED

I. Whether the charter schools are subject to the Sunshine Law.

II. Whether the charter schools are subject to the UIPA.

BRIEF ANSWER

I. Yes. In 03-01, we read section 302A-1184, HRS, as exempting charter schools from compliance with the Sunshine Law. The Attorney General, however, subsequently interpreted section 302A-1184, HRS, which exempts charter schools from "all applicable laws," to encompass only those laws that apply directly to schools and education. Based upon the Attorney General's interpretation, the exemption in section 302A-1184, HRS, does not shield charter schools from the Sunshine Law.

As we have found, the local school boards of charter schools ("charter school boards") are "boards" of the State that are "created" by statute and have "supervision, control, jurisdiction or advisory power over specific matters." They also are "required to conduct meetings and to take official actions." Consequently, charter school boards fit the definition of the term "board" under the Sunshine Law and, therefore, must comply with the Sunshine Law's requirements.

II. Yes. Charter schools are public schools and are created, funded and overseen by the State. In light of the Attorney General's interpretation of section 302A-1184, HRS, as only exempting charter schools from "laws that apply directly to schools and education," we find that charter schools are "agencies" as defined by the UIPA, and therefore, their records are subject to the UIPA's disclosure requirements.

FACTS

In 2003, we issued 03-01, which concluded that the Sunshine Law did not apply to charter schools because, under section 302A-1184, HRS, "[s]chools designated as new century charter schools shall be exempt from all applicable state laws" except for certain specifically enumerated laws relating to collective bargaining, discriminatory practices and health and safety requirements. Similarly, we relied upon section 302A-1184, HRS, as the basis for concluding in 03-10 that the charter schools were exempt from the UIPA.

Subsequent to our opinions, the Attorney General construed section 302A-1184, HRS, on at least two occasions. By letter dated October 22, 2003, the Office of the Attorney General advised Lincoln S.T. Ashida, Corporation Counsel for the County of Hawaii, that section 302A-1184, HRS, did not exempt charter schools from the special permit requirements of chapter 205, HRS. Specifically, the Office of the Attorney General stated:

> Based upon legislative intent and statutory language, our interpretation of H.R.S. § 302A-1184 is that new century charter

> schools are exempted from state laws that relate to the regulation of education. <u>However new century charter schools are subject to laws that apply to the general public and other state agencies and entities (i.e. criminal statutes, zoning regulations, etc.). It would be inconceivable to conclude that H.R.S. § 302A-1184 exempts new century charter schools from laws that the general public and other state agencies are required to adhere to.</u>

(Emphasis added).

More recently, in a letter dated January 21, 2004, to James Killebrew, Chair of the Wai'ola Waters of Life New Century Public Charter School local school board, Attorney General Mark Bennett similarly informed the charter school board that, notwithstanding the sweeping exemption contained in section 302A-1184, HRS, the charter school was subject to state land use laws. The Attorney General stated, "It is our view that the phrase 'all applicable state laws' [in section 302A-1184, HRS,] refers only to those laws that apply directly to schools and education." The Attorney General supported his conclusion by looking to the legislative history of section 302A-1184, HRS:

> We do not believe that the Legislature intended such sweeping results. The legislative history accompanying the enactment of Hawaii's charter school laws suggests that the Legislature authorized the establishment of charter schools to allow individual communities to develop educational programs and priorities for their children directly, and to relieve them as much as possible of the policies and procedures that the Board, and Department of Education prescribe for and impose upon the State's other public schools. However, <u>nothing in the legislative history suggests that Haw. Rev. Stat. § 302A-1184 was enacted to exempt charter schools from all of the State's laws rather than only those that are directed at schools or relate to the provision of education.</u>

(Emphasis added.)

In addition, on February 4, 2005, the Third Circuit Court of Hawaii, in <u>County of Hawaii v. Ala Loop Homeowners</u>, Civil No. 03-1-308, issued Findings of Fact, Conclusions of Law and Judgment ("Judgment") in a declaratory judgment action involving, among other things, the issue of whether section 302A-1184, HRS, exempted Wai'ola Waters of Life New Century Public Charter School from obtaining a special use permit as required by section 205-6, HRS, before operating a school on land located in an agricultural use district. The court concluded that section 302A-1184, HRS, "does not apply to (sic) so as to exempt a new century charter school from complying with the requirements and limitations of Chapter

205, HRS." Accordingly, the court ordered, "Notwithstanding HRS § 302A-1184, Wai'ola is subject to the limitations and requirements of Chapter 205, HRS."

Based upon the Attorney General's subsequent interpretation of section 302A-1184, HRS, and the Third Circuit Court's Judgment, you requested that we reconsider 03-01 and 03-10.

DISCUSSION

I. THE SUNSHINE LAW

While the issue has not been directly addressed by the Attorney General or the courts, we read the Attorney General's opinions and the Third Circuit's Judgment as a clear indication that section 302A-1184, HRS, does not exempt charter schools from the Sunshine Law or the UIPA. As quoted above, the Attorney General has opined that section 302A-1184, HRS, exempts charter schools from compliance with "only those [laws] that are directed at schools or relate to the provision of education." Because section 302A-1184, HRS, is outside the scope of OIP's jurisdiction, we have no authority to further interpret this statute. *See* Haw. Rev. Stat. § 92F-42(3), (18) (Supp. 2004). Accordingly, we defer to the Attorney General's interpretation of section 302A-1184, HRS.[1]

The Sunshine Law sets forth the open meeting requirements governing all state and county boards. Haw. Rev. Stat. § 92-3 (1993). It applies to each and every type of "board," as defined in the statute. The Sunshine Law clearly is not one of "those laws that apply directly to schools and education." Thus, in accordance with the Attorney General's interpretation, section 302A-1184, HRS, does not exempt charter schools from the Sunshine Law.

Therefore, we must consider whether charter school boards fall within the definition of the term "board" for purposes of the Sunshine Law. The Sunshine Law defines a "board" as:

> any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

Haw. Rev. Stat. § 92-2 (1993).

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[1] We are copying the Attorney General on this opinion and ask that he advise us if we have incorrectly construed his interpretation of section 302A-1184, HRS. Unless we hear differently from the Attorney General, we will assume that we have correctly understood his interpretation of section 302A-1184, HRS.

When assessing whether an entity is a "board" under this definition, we previously adopted the test articulated by the Hawaii Supreme Court in Green Sand Community Ass'n v. Hayward, Civ. No. 93-3259, slip op. at 9 (1996) (mem), and require that the entity satisfy five distinct elements to come within the jurisdiction of the Sunshine Law. OIP Op. Ltr. No. 01-01. More specifically, to be a "board," a charter school board must be: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) which is created by constitution, statute, rule, or executive order; (3) to have supervision, control, jurisdiction or advisory power over specific matters; (4) which is required to conduct meetings; (5) and which is required to take official actions. Id. at 11 (quoting Green Sand at 9).

In this case, we find that the charter school boards satisfy each of the elements that define a "board" for purposes of the Sunshine Law. First, the charter schools and their local school boards are "created" by statute because the process of issuing a charter is defined by statute. *See* Haw. Rev. Stat. § 302A-1186(b) (Supp. 2004) (a charter school's "organizational viability" includes having "a local school board established in accordance with law and its charter"). Second, under chapter 302A, HRS, once a charter is issued by the Board of Education ("BOE"), the charter school board is responsible for the charter school's performance, including matters of employment, curriculum and instruction, accountability, governance, and facilities. Haw. Rev. Stat. §§ 302A-1182(c), (g), 302A-1191(b) (Supp. 2004). In other words, the charter school boards "have supervision, control, jurisdiction or advisory power over specific matters." Third, following the Green Sand court, we have determined that boards that have held meetings, as defined by the Sunshine Law[2], satisfy the "required to conduct meetings" element. OIP Op. Ltr. No. 01-01 at 16. Lastly, given that the charter school boards establish the policies and oversee the operations of the charter schools, the charter school boards are required to take "official actions."

In light of our conclusion that charter school boards fulfill all the criteria for being a "board" under the Sunshine Law, we hereby withdraw the conclusion reached in 03-01 and, instead, opine that the charter school boards are subject to the Sunshine Law and must conduct their meetings in accordance with the statute's requirements.

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[2] The term "meeting" is defined as:

> the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

Haw. Rev. Stat. § 92-2 (1993).

II. UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

Like the Sunshine Law, the UIPA is not a law "directed at schools or related to the provision of education." Rather, the UIPA applies to all state and county "agencies," as that term is defined in the UIPA, and creates a presumption that the records maintained by the "agency" are public. Haw. Rev. Stat. § 92F-11 (1993). Accordingly, in light of the Attorney General's interpretation of section 302A-1184, HRS, the exemption contained therein does not exempt charter schools from the requirements of the UIPA.

The question, therefore, is whether the charter schools are "agencies" under the UIPA so that their records would be subject to public disclosure in accordance with the statute. The term "agency" is defined by the UIPA 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; <u>other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State</u> or any county . . . .

Haw. Rev. Stat. § 92F-3 (1993) (emphasis added).

We previously have opined that a determination about whether an entity is an "establishment owned, operated, or managed by or on behalf of this State" requires an examination of "the totality of circumstances surrounding the operation" of the entity. OIP Op. Ltr. No. 94-5; OIP Op. Ltr. No. 02-08. More specifically, in examining the totality of the circumstances, we have stated:

> Such an examination should include a consideration of whether the corporation performs a governmental function, the level of governmental funding, the extent of government regulation or control, and whether the entity was created by the government.

OIP Op. Ltr. No. 94-5 at 1; OIP Op. Ltr. No. 02-08 at 9.

In this case, there is no doubt that the charter schools perform a "governmental function" because they are "public schools," Haw. Rev. Stat. § 302A-101 (Supp. 2004), receive state funds as appropriated by the Legislature, Haw. Rev. Stat. § 302A-1185(a) (Supp. 2004), and are "created by the government," as each is created by a charter issued by the BOE, Haw. Rev. Stat. §§ 302A-1182 (e), 302A-1191(b) (Supp. 2004). While charter schools may not be subject to the same level of

"government regulation or control" as other public schools, the State nevertheless has substantial control over charter schools because the State has the responsibility of approving, evaluating and, if appropriate, revoking the charter of each charter school based upon its compliance with State standards. Haw. Rev. Stat. §§ 302A-1182(e), 302A-1186(b), 302A-1191(b) (Supp. 2004). Thus, based upon "the totality of circumstances surrounding the operation" of charter schools, charter schools fit the UIPA's definition of "agency." *See also* Letter from Charleen M. Aina, Deputy Attorney General, to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, dated January 10, 2002 ("[B]ecause the new century charter schools are public schools, and public schools are instrumentalities of the State of Hawaii, the Attorney General is responsible under state law to represent the new charter schools when they or their officials are sued in the federal or state courts").

Given our conclusion that the charter schools are "agencies" for purposes of the UIPA, their records are subject to disclosure in accordance with the statute. Haw. Rev. Stat. §§ 92F-3, 92F-11(a) (1993). In other words, the charter schools must respond to and allow access to their records as required by chapter 92F, HRS, and chapter 2-71, Hawaii Administrative Rules. Accordingly, we withdraw 03-10 and opine, instead, that the UIPA does apply to the charter schools notwithstanding section 302A-1184, HRS.

Because a charter school board is that particular charter school's "governing board," Haw. Rev. Stat. §§ 302A-1182(b), 302A-1191(b) (Supp. 2004), our conclusion that a charter school board is a "board" under the Sunshine Law and that a charter school is an "agency" under the UIPA are consistent with and supported by these statutes' intent. In enacting the Sunshine Law and the UIPA, the Legislature declared that the intent behind these statutes is to protect the public's right to know by opening up government to public scrutiny and participation. Haw. Rev. Stat. §§ 92-1, 92F-2 (1993). Our opinion that the charter school boards are subject to the Sunshine Law and the charter schools are subject to the UIPA means that charter schools are required to formulate and conduct their policies, including the curriculum and instruction, and discuss their finances as openly as possible and to allow public participation in the process, clearly consistent with the Legislature's expressed intent.

CONCLUSION

The local school boards of charter schools are "boards" and, therefore, must comply with the Sunshine Law's open meeting requirements. The charter schools are "agencies" under the UIPA and, therefore, are governed by the UIPA's open records requirements. The conclusion reached in this letter replaces the conclusions reached in 03-01 and 03-10.

By copy of this letter to Jim Shon, Executive Director of the Charter Schools Administrative Office, we are advising him of our opinion regarding the applicability of the Sunshine Law and the UIPA to the charter schools. If we can assist the charter schools in understanding their obligations under the Sunshine Law or the UIPA, we ask Mr. Shon to contact us. We are willing to participate in a training workshop if the charter schools believe that such an event would be helpful.

Very truly yours,

Lorna L. Aratani
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

LLA:cy

cc: The Honorable Jim Shon, Executive Director
Charter Schools Administrative Office

The Honorable Patricia Hamamoto, Superintendent
Department of Education

The Honorable Mark J. Bennett, Attorney General
Department of the Attorney General