LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

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
www.hawaii.gov/oip

LESLIE H. KONDO
DIRECTOR

January 19, 2005

Mr. Michael Tresler
Director of Finance
County of Kaua'i
4444 Rice Street, Suite 280
Lihu'e, Hawaii 96766

Re: Disclosure of Exact Salaries to the Kauai County Council (RFA-G 99-006)

Dear Mr. Tresler:

This is in reply to the request by the Department of Finance, County of Kauai ("Finance") for an opinion concerning the disclosure of certain information by Finance to the Kauai County Council ("Council"). Specifically, Finance asked whether, under the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"), it is allowed to provide the Council with the job titles of county employees, including covered employees[1], and the exact salaries corresponding to those positions. We understand Finance's concern about disclosure of the information to the Council to arise because of a provision in the Revised Charter of the County of Kauai ("Charter") that requires the Council to make the information publicly available upon its receipt from Finance and the relative ease by which the public can determine the exact salaries of specific county employees, including covered employees.[2]

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[1] The term "covered employees" refers to those employees "covered by or included in chapter 76 and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)." Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 2003).

[2] While the UIPA requires disclosure of only the salary range of covered employees, for exempt employees, i.e., employees who are not covered employees, section 92F-12(a)(14), HRS, requires disclosure of, among other things, their names, job titles and exact salaries. Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 2003). Because their exact salaries are public, disclosure of information from which exempt employees' exact salaries can be determined is consistent with the UIPA and raises no issue for us to consider. This opinion, therefore, is limited to disclosure of the information about covered employees and their exact salaries.

ISSUE PRESENTED

Whether a county charter provision requiring disclosure of the exact salaries of covered employees is contrary to the UIPA.

BRIEF ANSWER

No. The UIPA is premised on disclosure, i.e., on allowing public access to records maintained by state and county agencies. While the UIPA confers on an agency the discretion to withhold certain types of records (or certain types of information contained in records), it does not require an agency to deny access to those records. Accordingly, we do not believe that a county charter provision that requires disclosure of records that could otherwise be withheld under the UIPA violates or otherwise contradicts the statute.

FACTS

The Charter requires that the director of finance prepare a proposed annual budget ordinance ("proposed budget"), consisting of the operating and capital budgets for the ensuing fiscal year, and that the proposed budget be submitted by the mayor to the Council. Charter § 9.02.A. (1992). The Charter also requires the Council, upon receipt of the proposed budget, to publish a notice in the newspaper, announcing, among other things, that the proposed budget is available at the county clerk's office. Charter § 19.7 (1992).

You have advised us that, at the Council's request, the proposed budget consists of a "detailed computer run" that, among other things, lists each of the positions held by county employees by job title and the exact salary corresponding to the specific position.[3] You have also advised us that the budget passed by the Council, i.e., the budget ordinance, also includes all of the positions and corresponding salaries.[4] It is our understanding that neither the proposed budget

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[3] We understand that the operating budget must include salaries and other expenses necessary for the upkeep, maintenance and operation of the departmental or agency functions. Charter § 19.04 (1992). While we do not read the Charter to require that the exact salary of each county position be included in the proposed budget, the Council apparently interprets the Charter to require that such information to be part of the proposed budget. Accordingly, for the purposes of this opinion, we have considered the Charter to require the proposed budget to include the exact salaries of every county position.

[4] The OIP previously concluded that legislative enactments, such as the budget ordinance, are public, without segregation or redaction of any information contained therein. OIP Opinion Letter Number 91-17 (Oct. 7, 1991) (salary information about covered employees contained in budget ordinance is public).

nor the budget ordinance identify the name of county employee holding the specific job title.[5]

Finance is concerned that the exact salary of a covered employee can easily be determined. Specifically, Finance correctly notes that an employee's name and job title, including a covered employee's name and job title, are public and must be disclosed upon request. In many instances, especially where there is only one employee with a particular job title, that information can be cross-referenced against the information contained in the proposed budget to easily determine a specific employee's exact salary.

DISCUSSION

The Council's practice of requiring the job title of every County employee and the corresponding salary earned by that employee to be listed in the proposed budget raises a series of issues for us to consider. Because the proposed budget, once submitted to the Council, is required to be available to the public by the Charter, Finance's disclosure to the Council is, in essence, disclosure to the public. Moreover, although the information contained in the proposed budget does not identify the person holding the particular position, for the purposes of our analysis, because of the relative easy in determining that information through other public records, we have considered the proposed budget as if it identified the covered employee by name and his or her exact salary. We, therefore, have considered the issue raised by Finance's request to be whether Finance is allowed to withhold from public disclosure the exact salaries of covered employees notwithstanding the Charter's requirement that the information be public.[6] That inquiry, stated another way, is whether the Charter's requirement that the proposed budget, containing the exact salary information, be available to the public violates the UIPA.

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[5] The Office of the County Attorney provided us with the most recent budget ordinance, Ordinance No. B-2004-621, adopted by the Council on May 24, 2004 and approved by the Mayor on May 28, 2004. That ordinance lists all of the County positions and the corresponding salaries for each position, including those positions held by covered employees, and incorporates the detailed computer run submitted by Finance.

[6] The issue about whether Finance is authorized to share the exact salary information with the Council is addressed by section 92F-19(a)(6), HRS. That section allows an agency to disclose records (and information) that would otherwise be protected from disclosure "[t]o the legislature, or a county council, or any committee or subcommittee thereof[.]" Haw. Rev. Stat. § 92F-19(a)(6) (1999). While, generally, inter-agency disclosure under section 92F-19, HRS, is discretionary, i.e., it does not require disclosure by one agency to another, because the UIPA is premised on disclosure, as discussed herein, we believe that the Charter's requirement that Finance provide the proposed budget to the Council is consistent with the UIPA.

In mandating that the exact salaries of exempt employees be public, the legislature specifically required disclosure of only the salary range of covered employees. Specifically, the statute provides:

> Any law to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
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> * * *
>
> [t]he name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency[.]

Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 2003). By requiring disclosure of only their salary ranges, the legislature implicitly appears to have recognized that covered employees possess a privacy interest in their exact salaries.[7] Generally, where an individual has a significant privacy interest in a record (or in information contained in a record), an agency is required to balance the privacy interest against the public's interest in disclosure and may withhold the record where the person's privacy interest is not outweighed by the public's interest. Haw. Rev. Stat. § 92F-13(1) (1999).

In this case, however, we need not determine whether the covered employees' privacy interest in their exact salaries is significant and, if so, whether that privacy interest outweighs the public's interest in disclosure of their exact salaries. Instead, our analysis is concentrated solely on the Charter's requirement that the proposed budget, which includes the exact salaries, be made available to the public. We must determine whether that requirement, which effectively denies Finance the ability to withhold the proposed budget (or information contained in the record) as it may be permitted to do in accordance with one or more of the UIPA's exceptions,

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[7] We recognize that the proposed budget contains the proposed salaries of County employees, which may or may not be the actual salaries that those employees earn in the upcoming fiscal year. We, however, have assumed that the proposed salaries most frequently become the actual salaries and/or may be the exact salaries that the employees earn currently. Therefore, for the purposes of this opinion, we have analyzed Finance's request as if the covered employees' salaries as contained in the proposed budget are their actual salaries.

is consistent with the statute. At first blush, the Charter provision may appear to conflict with the UIPA's privacy exception. On closer review, however, we find no conflict between the statute and the Charter's requirement, notwithstanding the fact that the Charter's requirement results in the exact salaries of covered employees being disclosed.

Prior OIP opinions reveal a somewhat inconsistent interpretation regarding records that fall within the privacy exception, section 92F-13(1), HRS. For instance, after concluding that disclosure of retired public employees' retirement benefits would constitute a clearly unwarranted invasion of privacy, we noted that the plain language of the privacy exception did not prohibit an agency from disclosing such information that fell within the exception. OIP Op. Ltr. No. 90-1 at 9 (Jan. 8, 1990). In that opinion, however, in light of the right to privacy contained in Hawaii's Constitution, we strongly recommended against disclosure of information which, if disclosed, would constitute a clearly unwarranted invasion of privacy absent a court order or statute specifically requiring disclosure. Id. Subsequently, a number of our opinions construing the privacy exception appear to have interpreted the statute as prohibiting disclosure of those records that are covered by the exception. As an example, in OIP Opinion Letter Number 95-16, after noting that the federal Freedom of Information Act's exceptions to disclosure "permit but do not compel the non-disclosure of federal agency records," we stated that, under the UIPA:

> an agency must not disclosure government records that would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes, or records that are protected from disclosure by specific State statutes or by order of a court, under section 92F-13(4), Hawaii Revised Statutes.

OIP Op. Ltr. No. 95-16 at 13 (July 18, 1995) (emphasis added). Because of the inconsistency between our earlier opinions, we believe that it is necessary to clarify our interpretation of the privacy exception and to provide more specific guidance regarding our interpretation of the manner in which an agency should respond to a request for access to records that fall within that exception.

As we have noted in numerous prior opinions, the UIPA is intended to protect the public's right to access government records as well as to implement the right to privacy under Hawaii's Constitution. See Haw. Rev. Stat. § 92F-2 (1999); see also Conf. Comm. Rep. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817 (1988); State of Hawaii Organization of Police Officers v. Society of Professional Journalists, 83 Haw. 378, 396(1996). In fact, the statute's purpose section expressly directs that:

> [t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy,

> as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.

Haw. Rev. Stat. § 92F-2 (1999).

While the legislature intended that the constitutional right of privacy be considered in every appropriate case, in our opinion, not every record that may be withheld under the privacy exception falls within the constitutionally protected right to privacy. Because we believe that the privacy exception is broader than and allows protection of records that may not be protected by the Hawaii Constitution's right to privacy, we cannot interpret the language of section 92F-13, HRS, which provides that the section "shall not require disclosure" of the records listed therein, as prohibiting disclosure of records that fall within the statute's exceptions to disclosure. We simply do not read that language to preclude disclosure of the records. Rather, we interpret the exceptions to disclosure in section 92F-13, HRS, to confer on the agency maintaining the particular record the discretion to withhold the record from disclosure. That is, in our opinion, section 92F-13, HRS, contains the exceptions to mandatory disclosure; however, those exceptions do not prohibit agency disclosure. Accordingly, to the extent that our earlier opinions state or imply that records falling within the privacy exception must be withheld, those opinions are hereby overruled.[8] See OIP Op. Ltr. No. 02-08 (Sept. 6, 2002) (setting forth the standard for reconsideration of prior opinions).

Our interpretation, however, does not mean that an agency should choose, in its discretion, to disclose any record that falls within the UIPA's privacy exception. Because of the legislature's clear intent to protect a person's constitutional right to privacy, where a person's privacy interest outweighs the public's interest in disclosure, we believe generally that agencies should exercise their discretion to withhold the record. Although the UIPA grants discretion to an agency to disclose and does not require withholding, where a record implicates a person's constitutional right to privacy, it is our opinion that the Constitution requires the agency to withhold the record.[9] See SHOPO v. Society of Professional Journalists-

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[8] Although some of earlier opinions appear to have concluded otherwise, we note that the UIPA's legislative history directs that "[t]he case law under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1094 (1988). The United States Supreme Court's opinion in Chrysler Corp. v. Brown, 441 U.S. 281, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1978), further reinforces our present conclusion. In holding that that the exemptions to disclosure in the federal Freedom of Information Act ("FOIA") were not mandatory bars to disclosure, the Court concluded that the exemptions reflected Congress' concern about "the *agency's* need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information." Chrysler, 441 U.S. at 293 (italics in original).

[9] Similarly, where a statute outside of the UIPA makes a record (or information contained in the record) confidential, i.e., protected from public disclosure, we believe that the record

University of Hawaii Chapter, 83 Haw. 378, 927 P.2d 386 (1996). Accordingly, if an agency is intent upon disclosing a record that may be withheld under section 92F-13(1), HRS, we strongly recommend that the agency first determine, through consultation with its attorney, whether the information contained in the record arises to the level of constitutionally protected information. If the information contained in the record does not fall within the constitutional right to privacy, we believe that an agency may then elect to disclose that record.[10]

In this case, we do not believe that Finance must consult with its attorney before disclosing the covered employees' exact salaries. While the covered employees may have a significant privacy interest in their exact salary, they do not have constitutionally protected right to keep their exact salaries private. Nakano v. Matayoshi, 68 Haw. 140, 149, 706 P.2d 814, 819 (1985) (government employees have a reduced expectation of privacy in their salaries, which are of legitimate public concern, and that disclosure of exact salaries does not violate the constitutional right of privacy); see also Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 2003) (requiring disclosure of exact salaries of exempt employees).

While it is our opinion that the UIPA does not prohibit Finance from publicly disclosing the exact salaries of covered employees, notwithstanding the fact that the exact salaries could be withheld under section 92F-13(1), HRS,[11] the question remains as to whether the Charter provision that requires disclosure of the proposed budget, which includes the covered employees' exact salaries, and thereby obliterates Finance's discretion under the UIPA to withhold the information, is contrary to the statute. We previously have opined that a county charter provision is inferior to the UIPA and, therefore, cannot provide greater restrictions on access to records. See, e.g., OIP Op. Ltr. No. 95-14 (May 8, 1995). However, in contrast to that opinion, in this case, the Charter requires greater disclosure than that required by the UIPA.

In analyzing the question, we again consider the statute's purpose. We are persuaded that the statute is premised on disclosure. That is, the basic objective of

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should be withheld. See Haw. Rev. Stat. §92F-13(4) (1999). Although the UIPA may confer upon the agency the discretion to disclose the record, the other statute may require that the record be withheld.

[10] See Arakawa v. Sakata, 133 F. Supp.2d 1223, 1230 (D. Haw. 2001) (government employee immune from suit as long as conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known); see also Haw. Rev. Stat. § 92F-16 (1999).

[11] We have not attempted to balance the public's interest in disclosure against the privacy interest of the covered employees. Because of the manner in which we believe the statute and the Charter must be construed, we need not balance the competing interests.

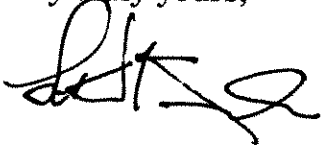
the UIPA is disclosure. The legislature, in enacting the UIPA, noted that the statute "will provide clear recognition of ...its primary goal of ensuring access to government records," Conf. Comm. Rep. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817 (1988), and confirmed that goal by expressly stating that the intent of the statute is to "[p]romote the public interest in disclosure[.]" Haw. Rev. Stat. § 92F-2 (1999).

Given that the statute is intended to "promote" public access to government records, we do not believe that requiring disclosure of records that could otherwise be withheld is contrary to the UIPA or its intent. See, e.g., Pacific International Services v. Hurip, 76 Haw. 209, 873 P.2d 88 (1994) (state law did not preempt county ordinance mandating greater insurance coverage than required by state law). We note, however, that our conclusion is limited. As discussed above, in addition to its primary goal of protecting access, the UIPA is intended to recognize the right to privacy contained in Hawaii's Constitution. Charter provisions or county ordinances that require greater disclosure than is required by the UIPA may run afoul of the UIPA or the Constitution by requiring disclosure of records (or information contained therein) that fall within the constitutional right to privacy.

CONCLUSION

We conclude that disclosure of the exact salaries in the proposed budget is consistent with the UIPA. Given that the underlying purpose of the UIPA is disclosure, the Charter's requirement that the proposed budget be available to the public, including information that Finance, in its discretion, may otherwise be able to withhold under the UIPA, does not violate or otherwise conflict with the statute.

Very truly yours,



Leslie H. Kondo
Director

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