December 22, 1992

Honorable Marion M. Higa
State Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Dear Ms. Higa:

Re: Working Papers of CPA Firm Contracting with the State Auditor

This is in reply to your letter to the Office of Information Practices ("OIP") dated November 10, 1992, requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the working papers of a certified public accounting ("CPA") firm, with whom the State Auditor contracted to perform an audit of the Department of Public Safety ("PSD"), are government records.

BRIEF ANSWER

Yes. Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1991) (emphasis added). While the Legislature did not define the meaning of the term "maintain," in a previous OIP opinion letter, we concluded that the definition of this term set forth in the uniform law upon which the Legislature modeled the UIPA provides useful guidance in construing the meaning of this term.

Under the Uniform Information Practices Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws, the term "maintain" means "to hold, possess, preserve, retain, store, or administratively control." Model Code § 1-105(6) (1980). The commentary to this Model Code

definition explains that the term "maintain" is defined "to sweep as broadly as possible" and that the "administrative control component of the definition is especially important because it prevents an agency that does not have physical custody of government records from evading its obligations under this Code." Model Code . 1-105 commentary at 9 (1980).

Under the State Auditor's contract with the CPA firm, at any time during and subsequent to completion of the audit of the PSD, the CPA firm is required to make available to the State Auditor the working papers developed during its audit. Because the State Auditor has the legal right to obtain the working papers upon demand, we believe that the State Auditor retains "administrative control" over the CPA firm's working papers. Accordingly, we conclude that notwithstanding the fact that the State Auditor lacks physical custody of the working papers, it nevertheless "maintains" them. Therefore, we conclude that these working papers are "government records" and that their disclosure is governed by the UIPA.

The State Auditor's past practice has been to make its working papers available for public inspection at the completion of an audit. Generally, the State Auditor should continue its practice in this case and in the future. However, we note that given the nature of the audit that was performed by the CPA firm in this case, it is possible that portions of the working papers may contain information that is protected from required public disclosure by the UIPA's "clearly unwarranted invasion of personal privacy exception," section 92F-13(1), Hawaii Revised Statutes.

Similarly, portions of the working papers may reveal confidential commercial and financial information relating to the CPA firm that performed the audit that might be protected from disclosure under section 92F-13(3), Hawaii Revised Statutes.

Should the State Auditor require definitive guidance from the OIP concerning whether portions of the CPA firm's working papers relating to the PSD audit are protected from required public disclosure by one of the UIPA's exceptions, the OIP will be in a position to provide such advice after having had the opportunity to examine the information in question.

FACTS

Under article VII, section 10 of the Constitution of the State of Hawaii, the State Auditor is directed:

> [T]o conduct post-audits of the transactions, accounts, programs and performance of all departments, offices and agencies of the State of Hawaii and its political subdivisions, to certify to the accuracy of all financial statements issued by the respective accounting officers and to report the auditor's findings and recommendations to the governor and the legislature.

Haw. Const. art. VII, . 10.[1] Section 23-9, Hawaii Revised Statutes, provides that "[a]ll reports" made by State Auditor concerning audits and examinations "shall be made available for public inspection."

By contract dated April 16, 1992, bearing Contract No. 32593, the State Auditor contracted with a CPA firm, Coopers & Lybrand ("C&L"), to perform an audit of the PSD. In an amendment to the contract dated September 10, 1992, the scope of the C&L audit was enlarged to include an examination by C&L of whether vacation and sick leave was being properly recorded in the PSD's personnel records, and a determination of whether a pattern of abuse of overtime, sick leave, and vacation leave policies existed at the PSD.

The PSD recently requested the State Auditor for access to the working papers of C&L. Because the State Auditor may receive similar requests for audits performed by other CPA firms, the State Auditor requests an opinion concerning whether the working papers of C&L are "government records" under the UIPA, and whether it must permit the public to inspect and copy the same.

In a telephone conversation on November 19, 1992, Dallas G. Weyand, Assistant Auditor, confirmed that the State Auditor's past practice has been to make its own working papers available for public inspection upon the completion of an audit, and upon the issuance of the State Auditor's report.

DISCUSSION

Section 92F-11(b), Hawaii Revised Statutes, states,"[e]xcept as provided in section 92F-13, each agency upon request by any

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[1]Section 23-4, Hawaii Revised Statutes, provides an additional and more detailed description of the State Auditor's functions and duties.

person shall make government records available for inspection and copying." Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. . 92F-3 (Supp. 1991) (emphasis added).

While the Legislature did not define the meaning of the term "maintain" when it adopted the UIPA, in OIP Opinion Letter No. 91-5 (April 15, 1992), the OIP concluded that the definition of this term set forth in the uniform law upon which the UIPA was patterned provides useful guidance in construing the meaning of this term.

Specifically, the Legislature modeled the UIPA upon the Uniform Information Practice Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws. The term "maintain" is defined in section 1-104(6) of the Model Code to mean, "hold, possess, preserve, retain, store, or administratively control." The commentary[2] to this Model Code provision reflects that: (1) the term "maintain" was defined broadly, and (2) an agency that lacks physical custody of a record may nevertheless "maintain" that record:

> Maintain is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important since it prevents an agency that does not have physical custody of government records from evading its obligations under this Code.

Model Code . 1-105 commentary at 9 (1980) (emphasis added).

In OIP Opinion Letter No. 91-5, we noted that the term "control" has different meanings depending upon the context in which it is used, and that most authorities agree that in its usual context, it refers to "the power or authority to manage, direct, or oversee," or to "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." See OIP Op. Ltr. No. 91-5 at 7 and cases cited therein; see also, Biben v. Card, 119 F.R.D. 421,

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[2]The UIPA's legislative history suggests that the Model Code commentary be consulted for guidance in interpreting similar provisions of the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 969, 972 (1988).

425 (W.D. Mo. 1992) ; M.L.C. v. North American Philips Corp., 109 F.R.D. 134, 136 (S.D.N.Y. 1992) ("control" includes legal right of producing party to obtain documents from other sources upon demand").

In determining whether the State Auditor retains administrative control over the CPA firm's working papers, section E.2. of the specifications of the State Auditor's contract with C&L must be examined. Section E.2. of the specifications attached to the State Auditor's contract with C&L states:

> 2. Audit working papers. At any time during and subsequent to completion of the audit, the Contract Auditor shall make available to the State Auditor the working papers developed during the audit, including among others, the following:
>
> a. The audit program and internal control structure documentation.
>
> b. Schedules, recommendations, computations, analyses, audit notes, confirmation letters and replies, and other data representing a record of work done in support of account transactions and balances and systems.
>
> c. Documents obtained and other working papers relating to the audit.
>
> The working papers shall not be made available to others except by mutual consent of the State Auditor and the Contract Auditor.

Office of the Auditor State of Hawaii, Specifications and Instructions for Submission of a Proposal for Financial Audit of the Department of Public Safety, . E.2 at 4 (March 1992) (emphases added).

Based on the above-quoted provision of the specifications of the State Auditor's contract with C&L, in our opinion, the State Auditor retains administrative control over the working papers

prepared in connection with the PSD audit, because the State Auditor retains a legal right to obtain the documents from C&L. While the contract provides that the working papers shall not be disclosed to others except by mutual consent, this provision does not change the fact that the State Auditor has the legal right to possession of the working papers upon demand. Accordingly, it is our opinion that notwithstanding the fact that working papers are in the physical possession of C&L, the State Auditor "maintains" the working papers and, therefore, the working papers constitute "government records" under the UIPA. Haw. Rev. Stat. . 92F-3 (Supp. 1991).

In its letter to the OIP requesting an advisory opinion, the State Auditor also requests an opinion from the OIP concerning whether it must provide access to the working papers, or whether it is free to share the working papers with the PSD. Except as provided in section 92F-13, Hawaii Revised Statutes, each agency upon request by any person must make government records available for inspection and copying upon request by any person. Haw. Rev. Stat. . 92F-11(b) (Supp. 1991).

The State Auditor's past practice has been to make its own working papers available for public inspection at the completion of an audit report. We see no valid reason why the State Auditor should depart from this practice with respect to the working papers prepared by C&L. However, we note that because of the unusual nature of the audit performed by C&L, it is conceivable that portions of the working papers may be protected from required public disclosure under section 92F-13(1), Hawaii Revised Statutes, to avoid a "clearly unwarranted invasion of personal privacy."

Specifically, we understand that C&L's audit involved an examination of the use of sick and vacation leave within the PSD, as well as an examination of payroll information. Under section 92F-12(a)(14), Hawaii Revised Statutes, the compensation paid to a present or former agency officer or employee is considered public, except that only salary range information is considered public for employees covered by or included in chapters 76, 77, or 297, Hawaii Revised Statutes, or in bargaining unit 8. Haw. Rev. Stat. . 92F-12(a)(14), Hawaii Revised Statutes.

Additionally, while in OIP Opinion Letter No. 90-17 (Apr. 24, 1990), we concluded that an agency employee's leave records are government records that are generally public, we also advised that agencies should segregate, or excise, information concerning an employee's medical diagnosis, condition, or treatment from sick leave records before making them available

for inspection and copying.

We are also informed by the State Auditor that C&L may claim that portions of the working papers contain commercial and financial information that C&L considers to be confidential. Under section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose certain confidential commercial and financial information, the disclosure of which is likely to result in substantial competitive harm to the submitter of the information. See generally OIP Op. Ltr. No. 92-17 at 11 (Sept. 2, 1992).

Without having had the opportunity to review the actual contents of the working papers compiled by C&L, it is difficult for the OIP to express a definitive opinion concerning whether the information contained therein is protected from public disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes.

However, to the extent that none of these exceptions are applicable to the C&L's working papers, the provision of section E.2. of the specifications to the State Auditor's contract, which requires the consent of C&L before the State Auditor makes the working papers "available," is unenforceable. See OIP Op. Ltr. No. 89-10 (Dec. 12, 1989); OIP Op. Ltr. No. 90-2 (Jan. 18, 1991); OIP Op. Ltr. NO. 90-39 (Dec. 31, 1990); OIP Op. Ltr. No. 92-21 (Oct. 27, 1992) (an agency cannot bargain away its duties under the public records act with promises of confidentiality).

Accordingly, we conclude that working papers prepared by C&L in connection with its audit of a State agency's leave and payroll records are "government records" under the UIPA, because these working papers constitute "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Additionally, unless the information contained in the working papers falls within one of the exceptions in section 92F-13, Hawaii Revised Statutes, the State Auditor must make the same available for public inspection and copying, notwithstanding provisions to the contrary in its contract with the firm that performed the audit.

Should the State Auditor require definitive guidance from the OIP concerning whether information in C&L's working papers is covered by one of the UIPA's exceptions to required public disclosure, the OIP will be in a position to supply such guidance after we have been provided with the opportunity to examine the information in question. However, assuming that some information in the working papers would be protected from public disclosure,

under the limited conditions set forth in section 92F-19, Hawaii Revised Statutes, the State Auditor is authorized to disclose otherwise "confidential" government records to other State or county agencies.

CONCLUSION

Because the State Auditor retains the legal right to require C&L to produce the working papers, we conclude that the State Auditor "maintains" the working papers, notwithstanding the fact that it lacks physical custody of these records.

Thus, we conclude that such working papers constitute "government records," which term is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. . 92F-3 (Supp. 1991) (emphasis added).

Consequently, we conclude that working papers prepared and retained by a C&L under contract with the State Auditor constitute "government records" that are subject to the UIPA's disclosure provisions.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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Director
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