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December 12, 1989

MEMORANDUM

TO: The Honorable John C. Lewin, M.D.
Director of Health

ATTN: Cynthia Kamakawiwoole, Section Supervisor
Hospital and Medical Facilities Branch
Department of Health

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Access to Files Concerning Special Treatment
Facility Licensees

This is in reply to your letter dated September 26, 1989 requesting an advisory opinion concerning public access to files maintained by the Department of Health ("Department") pertaining to organizations which have been granted a license to operate a "special treatment facility."

ISSUE PRESENTED

Whether government records contained within Department files concerning organizations granted licenses to operate "special treatment facilities" are subject to public inspection and copying under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes.

BRIEF ANSWER

Portions of the government records contained within the Department's files concerning "special treatment facility" licensees are protected from disclosure under section 92F-13(1)

and (3), Hawaii Revised Statutes. As part of the licensing process, an applicant submits detailed budget data which is protected from disclosure as a government record, which if disclosed, would "frustrate a legitimate government function" under the UIPA.

Additionally, portions of the records maintained by the Department concerning "special treatment facility" licensees contain information relating to the licensees' employees' names, home addresses, and nongovernmental work experience, the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy," under the UIPA. However, disclosure of the names and residential addresses of the licensees' corporate officers and directors would not implicate a significant privacy interest, as such information is routinely made available for public inspection by the Department of Commerce and Consumer Affairs. Yet, disclosure of such officers' and directors' residential telephone numbers, nongovernmental work history and business addresses would constitute a clearly unwarranted invasion of personal privacy under the UIPA.

With the exception of the protected information referred to above, there are other records in the Department's typical file which must be made available for public inspection. This would include such records as applications, policy and procedure manuals, code compliance surveys, notifications of deficiencies and certificates of licensure.

FACTS

An attorney for an organization which intends to establish a "special treatment facility" for brain damaged clients, has requested permission to inspect and copy all "applications, plans and procedures, clearance/approvals . . . certificates of licensure, and any other public records" pertaining to organizations licensed as special treatment facilities in the past five years. Under section 334-1, Hawaii Revised Statutes, a "special treatment facility" ("STF") is defined as "a public or private facility which provides a therapeutic residential program for care, diagnosis, treatment or rehabilitation services for emotionally distressed persons, mentally ill persons or persons suffering from substance abuse."

In connection with this opinion, we have reviewed the contents of a typical file maintained by the Department

concerning a STF licensed by the Department. This file contains several government records pertaining to the licensee, including the applicant's application, policy and procedure manual, certificates of licensure, surveys by the Fire Department for code compliance, correspondence, notifications of deficiencies, program reviews, surveys for compliance with Departmental rules, checklists, reports, projected budget data, and the names, addresses, home and business telephone numbers of the corporate licensees' officers and directors. The file also contains the nongovernmental work history of certain of the licensees' staff members, officers, and directors.

DISCUSSION

Section 92F-11(a), Hawaii Revised Statutes, provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Consistent with the Legislature's desire to temper the policy of conducting government business as openly as possible by recognition of the right of the people to privacy under the State's constitution, the UIPA provides:

This chapter shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

Haw. Rev. Stat. § 92F-13(1) (Supp. 1989).

Moreover, the Legislature, in section 92F-14(b), Hawaii Revised Statutes, specified examples of information in which an "individual"¹ has a significant privacy interest. Among this information is:

- (7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

¹ "Individual" is defined for purposes of the UIPA as "a natural person." Haw. Rev. Stat. § 92F-3 (Supp. 1989). Thus, corporations, partnerships, business trusts, or associations have no "personal privacy" interest in government records.

- (A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;
- (B) Information on the current place of employment and required insurance coverages of licensees; and
- (C) The record of complaints including all dispositions;

Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 1989) (emphasis added).

Thus, generally speaking, a Departmental licensee who is not a natural person has no personal privacy interest in government records, although natural persons referred to in such records may have such an interest.

The UIPA likewise does not require disclosure of "[g]overnment records which, pursuant to any state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1989).² Chapter 334, Hawaii Revised Statutes does shield certain records from public inspection:

§ 334-5. Confidentiality of Records.

All certificates, applications, records, and reports made for the purposes of this chapter and directly or indirectly identifying a person subject hereto shall be kept confidential and shall not be disclosed by any person except so far (1) as the person identified, or the person's legal guardian, consents, or (2) as disclosure may be deemed necessary by the director of health or by the administrator of a private psychiatric or special treatment facility to carry out this chapter, or (3) as a court may direct upon its determination that

² We express no opinion concerning whether the government records under consideration herein are protected from disclosure under federal law. If the Department receives federal funding to establish STFs, it would be wise to consult federal statutes and regulations which may contain applicable restrictions on disclosure.

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disclosure is necessary for the conduct [of] proceedings before it and that failure to make the disclosure would be contrary to the public interest, or (4) as disclosure may be deemed necessary under the federal Protection and Advocacy for Mentally Ill Individuals Act of 1986, Public Law 99-319, to protect and advocate the rights of persons with mental illness who reside in facilities providing treatment or care. For the purposes of this section, "facilities" shall include, but not be limited to, hospitals, nursing homes, community facilities for mentally ill individuals, boarding homes, and care homes.

Nothing in this section shall preclude disclosure, upon proper inquiry, of any information relating to a particular patient and not clearly adverse to the interests of the patient, to the patient, the patient's family, legal guardian, or relatives, nor, except as provided above, affect the application of any other rule or statute of confidentiality. The use of the information disclosed shall be limited to the purpose for which the information was furnished.

Haw. Rev. Stat. § 334-5 (Supp. 1989) (emphasis added).

The use of the conjunctive "and" in this section strongly suggests that "records and reports" maintained by the Department are not confidential per se, rather only those government records "directly or indirectly identifying a person subject" to chapter 334 are protected from disclosure. See 1A N. Singer, Sutherland Statutory Construction § 21.14 (Sands 4th ed. rev. 1984). As we construe this section, we believe that "a person subject hereto" is a person who resides in one of the "facilities" referred to in sections 334-1 and 334-5, Hawaii Revised Statutes, not the organization licensed to operate such a facility. Thus, to the extent that the Department's records do not directly or indirectly identify a patient present at a licensed facility and are not otherwise protected from disclosure under the UIPA, they must be made available for public inspection and copying. This will require the Department to review its records and segregate the disclosable from the nondisclosable information, before making its records available for public inspection.

The UIPA also does not require the disclosure of

"[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). The legislative history of the UIPA helps clarify the scope of this exception:

The following are examples of records which need not be disclosed if disclosure would frustrate a legitimate government function.

. . . .

- (7) Trade secrets or confidential commercial or financial information;

S. Stand. Comm. Rep. No. 2580, 14th Leg. Reg. Sess., Haw. S.J. 1093, 1095 (1988).

We recently thoroughly explored the disclosure of confidential commercial and financial information in OIP Op. Ltr. No. 89-5, dated November 20, 1989. Briefly, in that opinion we concluded that "commercial or financial information was 'confidential' if its disclosure was likely '(1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Id., quoting, National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Further, in that opinion we observed that courts have recognized the disclosure of the following information as generally causing competitive harm:

[A]ssets, profits, losses and market shares, data describing a company's workforce which would reveal labor costs, profit margins and competitive vulnerability, a company's selling prices, purchase activity and freight charges, technical and commercial data, names of consultants and subcontractors, performance, cost and equipment information, shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company, and technical proposals which are submitted, or could be used, in conjunction with bids on government contracts.

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Id. at p. 16, quoting, J. Franklin and R. Bouchard, Guidebook to the Freedom of Information and Practices Acts § 1.07 at 1-79 (2d ed. 1989).

The government records provided to our office as an example of a typical file concerning a STF licensee contained a detailed projected operating budget that we believe qualifies as confidential commercial or financial information.³ Disclosure of this information would frustrate a legitimate government function by discouraging those interested in developing private STFs from doing so, thereby rendering ineffectual the Department's duty to "foster and coordinate a comprehensive mental health system utilizing public and private resources . . . to treat and rehabilitate" those with mental and emotional disorders. Haw. Rev. Stat. § 334-2 (1985). However, in reviewing the projected budget contained in the file submitted for our review, we observed that the licensee received fees and grants from state agencies. This fact, along with the amount of grants and fees awarded to the licensee and the manner in which the funds were expended, should be made available for public inspection and copying due to the significant public interest in how the state taxpayer's money is being spent.

Lastly, the typical STF licensee file provided to our office contained information concerning the nongovernmental work experience of one or more of the licensee's employees, the name, address, business and home telephone numbers, place of employment, and job title of the corporate licensee's officers and directors. Section 92F-14(b)(5), Hawaii Revised Statutes establishes that individuals have a significant personal privacy interest in information concerning their non-governmental employment history, "except as necessary to demonstrate compliance with requirements for a particular government position." Whether disclosure of such information would "constitute a clearly unwarranted invasion of personal privacy" depends on whether "the public interest in disclosure

³ We also observe that the licensee is engaged in "actual competition," with similar licensees, thus establishing a necessary element for information to be protected as confidential commercial or financial information. See OIP Ltr. No. 89-5 at 17.

outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989).

While disclosure of this information might indicate whether the Department is granting licenses to STF's whose staff is inexperienced, we conclude such interest is outweighed by the staff member's significant privacy interest, except where certain work experience by staff members is a prerequisite to obtaining a STF license. Disclosure of the nongovernmental employer, and job title of the licensee's officers and directors, is outweighed by their significant privacy interest in such information,⁴ as we can conceive of no UIPA policy that would be furthered by disclosure of this data.

We have previously considered whether individuals have a significant privacy interest in such details as their home addresses. See OIP Op. Ltr. No. 89-4 (Nov. 9, 1989). In that opinion, we concluded that they did. However, the reasoning underlying that opinion does not extend to the disclosure of the names or residential addresses of officers and directors of corporations registered with the Department of Commerce and Consumer Affairs, Business Registration Division ("DCCA"). Under section 415-125, Hawaii Revised Statutes, each domestic and foreign corporation transacting business in Hawaii must file an annual report which sets forth the names and residential addresses of its officers and directors. Information contained in this report has been and is routinely made available for public inspection by the DCCA. It was not the Legislature's desire that section 92F-13, Hawaii Revised Statutes, be used to "close currently available records, even though those records might fit within" an exception. S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., S.J. 689, 690 (1988). Accordingly, information relating to a licensee's officers' and directors' names and residential addresses is available for public inspection under the UIPA, if contained within an STF licensee file, as such information is routinely available from the DCCA. However, such officers' and directors' residential telephone numbers should be sanitized from the file before making the files available for public inspection.

⁴ We believe that the use of the term "work history" in section 92F-14(b)(5), Hawaii Revised Statutes, is broad enough to encompass information relating to an individual's present employment.

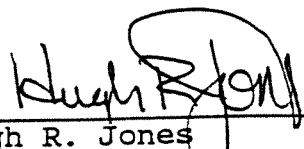
Lastly, we caution the Department that the files of other licensees may contain additional information different from that considered here. Accordingly, each file must be reviewed, and data that is protected under the UIPA must be segregated before public inspection.

CONCLUSION

The UIPA does not require the disclosure of government records which are protected from disclosure by State law. Section 334-5, Hawaii Revised Statutes makes confidential all records that "directly or indirectly identify a person" who is a resident at any facility referred to in chapter 334, Hawaii Revised Statutes.

Detailed projected budgetary data concerning an applicant is commercial or financial information, "which if disclosed would frustrate a legitimate governmental function" under the UIPA. As such, the Department is not required to make this information available for public inspection under the UIPA. Similarly, the disclosure of a licensee's staff members, or the officers' and directors' nongovernmental work history would "constitute a clearly unwarranted invasion of personal privacy" under the UIPA, unless the Department requires staff members to have certain work experience as a condition of receiving a license.

A corporate STF's officers' and directors' names and residential addresses are not protected from disclosure under the UIPA as such information has been routinely available from the DCCA both before and after the passage of the UIPA. However, the Department should sanitize such officers' and directors' residential telephone numbers from government records before permitting public inspection of same. Accordingly, after this file has been sanitized of any protected information, the remainder of the file should be made available for public inspection.



Hugh R. Jones
Staff Attorney

HRJ:sc
cc: Ellen Godbey Carson, Esq.

APPROVED:



Kathleen A. Callaghan, Director

