

January 31, 1990

MEMORANDUM

TO: The Honorable Alfred C. Lardizabal
Director of Personnel Services

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of Supervisory Management Training
Course Materials

This is in reply to a memorandum dated January 10, 1990, from Karen Goo, Legal Assistant, Employment Relations Division, Department of the Attorney General, requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the Department of Personnel Services ("DPS") must permit the public to inspect and copy materials used in connection with a DPS supervisory management training course.

BRIEF ANSWER

DPS training materials used in connection with courses entitled "Supervisory Management I and II" must be made available for public inspection and duplication pursuant to section 92F-11(a), Hawaii Revised Statutes. Based upon the legislative history of the UIPA and case law interpreting Exemption 2 of the federal Freedom of Information Act ("FOIA"), we conclude that disclosure of these government records will not result in "the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). Further, these DPS training course materials are not otherwise protected from disclosure under the provisions of section 92F-13, Hawaii Revised Statutes.

However, we observe that certain personnel manuals and training materials may be protected under section 92F-13(3), Hawaii Revised Statutes, when such records are "predominately internal" and when disclosure of such records "significantly risks circumvention of agency regulations or statutes." Such a risk is not present as to the government records under consideration here.

FACTS

Pursuant to section 26-5, Hawaii Revised Statutes, the DPS administers the state personnel program, including personnel development and training. In furtherance of this statutory duty, the DPS' Training and Safety Division conducts training courses for state employees on a variety of subjects.

By letter dated December 7, 1989, to the DPS, James W. Geiger, Esq., requested access to course training materials for the DPS courses entitled "Supervisory Management I and II." These course training materials are not subject to federal copyright protection. The DPS seeks an advisory opinion concerning public access to these materials under the UIPA.

DISCUSSION

The UIPA, the State's new public records law, provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Under the UIPA, a "government record" is "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989).

Exceptions to the UIPA's general rule of mandatory public access to government records are set forth at section 92F-13, Hawaii Revised Statutes. This section provides:

§92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

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

- prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
 - (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
 - (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

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

Based upon a review of the pertinent training course materials, in our opinion they contain no information which is protected by paragraphs (1), (2), (4), and (5) of section 92F-13, Hawaii Revised Statutes. However, a further examination of section 92F-13(3), Hawaii Revised Statutes, would be instructive as applied to personnel or staff training manuals generally.

Senate Standing Committee Report No. 2580, dated March 31, 1988, provides useful guidance in applying the "frustration of legitimate government function" exception to the UIPA. It provides:

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

- (1) Records or information compiled for law enforcement purposes;

- (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;
- (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining
- (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
- (5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;
- (6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
- (7) Trade secrets or confidential commercial and financial information;
- (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
- (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

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

A review of the above categories of government records considered by the Legislature to be examples of records eligible for protection under the exception set forth at section 92F-13(3), Hawaii Revised Statutes, reveals that the supervisory management training materials do not appear to fall within the scope of the enumerated examples. These categories, however, are but mere examples in a non-exhaustive list. Resort to the FOIA, 5 U.S.C. § 552 (1989), also provides guidance in determining the types of government records which, if disclosed, would frustrate a legitimate government function.

In applying Exemption 2 of the FOIA relating to the internal personnel rules and practices for an agency, the federal courts have extended its protection to personnel manuals when they are "predominantly internal" and where disclosure "significantly risks circumvention of agency regulations or statutes." Cooker v. Bureau of Alcohol Tobacco and Firearms, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc); National Treasury Employees Union v. Customs Service, 802 F.2d 525 (D.C. Cir. 1986).

Courts applying this standard have held that a wide variety of information pertaining to law enforcement investigations can be regarded as "internal," including but not limited to:

- (1) General guidelines for conducting investigations, see e.g., Goldsborough v. IRS, Civil No. 81-1939, slip op. at 15-16 (D. Md. May 10, 1984) (protecting guidelines to be used in criminal investigation);
- (2) Guidelines concerning when to pursue an investigation, see, e.g., Wilder v. IRS, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984); and
- (3) Guidelines for identifying law violators, see, e.g., Fund For a Conservative Majority v. Federal Election Comm'n, Civil No. 84-1342, slip op. at 4 (D.D.C. Feb. 26, 1985) (audit criteria not "secret law" because they merely observe public behavior for illegal activity and do not define illegal activity).

Similarly, a variety of personnel manuals or policies have been held to significantly risk circumvention of the law if disclosed. See Cox v. Department of Justice, 601 F.2d 1, 4 (D.C.

Cir. 1979) (prison weapon, handcuff, and transportation security procedures); Cooker v. Federal Bureau of Prisons, Civil No. 86-0510, slip op. at 3-4 (D.D.C. Feb. 27, 1987) (general prison post orders, handcuff procedures, security and arming of officers, and alarm procedures); Dirksen v. HHS, 803 F.2d 1452, 1458-59 (9th Cir. 1986) (internal audit procedures protected in order to prevent risk of circumvention of agency Medicare reimbursement regulations).

Turning to an examination of the DPS course manuals for "Supervisory Management I and II," they contain no information which, if disclosed, would risk circumvention of agency regulation or statute, or otherwise frustrate a legitimate government function. Rather, the manuals primarily educate course attendees as to supervisory responsibilities, communication skills, planning, organizing, controlling, and approaches to motivation of staff employees. Although this information may be "predominantly internal," its disclosure is not likely to risk circumvention of agency regulations or statute or frustrate government functions.

Accordingly, we conclude that as to the training materials for the DPS courses entitled "Supervisory Management I and II," they are government records which must be made available for public inspection and copying. However, we observe that on different facts, personnel manuals or training materials may be protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, if such materials are "predominantly internal," and where their disclosure "significantly risks circumvention of agency regulations or statutes."

CONCLUSION

DPS training materials used in connection with courses entitled "Supervisory Management I and II" must be available for public inspection and duplication pursuant to section 92F-11(a), Hawaii Revised Statutes. Based upon the legislative history of the UIPA and case law interpreting Exemption 2 of the FOIA, we conclude that disclosure of these government records will not result in "the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). Further, these DPS training course materials are not otherwise protected from disclosure under the provisions of section 92F-13, Hawaii Revised Statutes.

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HRJ:sc
cc: James M. Geiger, Esq.
Karen Goo, Employment Relations Division

APPROVED:

Kathleen A. Callaghan
Director