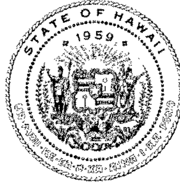

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This is an appeal of a denial of access to a government record under part II of the Uniform Information Practices Act (Modified) (the "UIPA"), chapter 92F, Hawaii Revised Statutes ("HRS"). Haw. Rev. Stat. § 92F-15.5. The Office of Information Practices ("OIP") is authorized to issue this ruling under section 92F-42(1).

DECISION

Requester: Ms. Pamela Davis/Animal Advocate, Inc.
Agency: Hawaii Humane Society
Date: August 7, 2009
Subject: HHS as Agency; Animal Control Enforcement Records (APPEAL 09-5)

REQUEST FOR DECISION

Requester seeks a determination on whether the Hawaii Humane Society ("HHS") properly denied Requester's request for "any and all complaints and the disposition of such complaints, pertaining to the [woman known as the "Cat Lady"] and the animals in her possession, and any and all notes, investigative reports, photographs, e-mails, telephone messages, and all other documents regarding the woman and the animals she keeps" (the "Cat Lady Investigation").

OIP had previously opined that HHS is an "agency" subject to the UIPA "for the activities within the scope of its agreement with the City, and its enforcement of State and county laws enacted for the health, safety, and welfare of the public[.]" OIP Op. Ltr. No. 90-31. However, the Hawaii Supreme Court recently rejected the "totality of circumstances" balancing test adopted by OIP to determine whether a hybrid public-private entity falls within the definition of "agency" under the UIPA. See Olelo: The Corp. for Comm'ty Tel. v. Office of Information Practices, 116 Haw. 337, 173 P.3d 484 (Haw. 2007); OIP Op. Ltr. No. 02-08.[1] In light of Olelo, OIP as a

[1] Olelo: The Corporation for Community Television ("Olelo") operates public, educational, and government ("PEG") community access cable channels on the island of O'ahu.

threshold matter in this appeal reconsiders its opinion in OIP Opinion Letter Number 90-31 regarding HHS' status as an "agency" subject to the UIPA. OIP Op. Ltr. No. 02-08 (OIP standard for reconsideration includes a change in the law).

Unless otherwise indicated, this determination is based solely upon the facts presented in Requester's letter to OIP dated August 28, 2008, and the attached letters to Requester from Ms. Pamela Burns, HHS President and CEO and from Requester to Ms. Burns dated June 27, 2008; the letter from Ms. Janice Futa, attorney for HHS, to OIP dated September 25, 2008; and HHS' contracts with the City and County of Honolulu (the "City") provided to OIP by the City's Department of Budget and Fiscal Services.

QUESTIONS PRESENTED

1. Whether HHS is an "agency" as defined by the UIPA and therefore subject to its provisions.

2. Whether HHS must disclose records it maintains related to the Cat Lady Investigation.

BRIEF ANSWERS

1. Yes. Applying the Olelo decision's construction, OIP believes that HHS is an "agency" for the limited purpose of compliance with the UIPA when it provides services directly related to its enforcement of state and county laws concerning animal control. In so doing, HHS substitutes for the City in the performance of a government function.

2. Yes. HHS must disclose records maintained in the performance of services directly related to its enforcement of animal control laws in accordance with the UIPA. HHS' records related to the Cat Lady Investigation are maintained by HHS as part of its enforcement of state laws concerning the treatment of animals. Thus, HHS must disclose those records unless and to the extent that they may be withheld under a UIPA exception to disclosure.

FACTS

HHS is a private non-profit organization that has two service contracts with the City. Specifically, the City has contracted with HHS to (1) provide a shelter for the care and control of animals and to perform animal control related services (the "Animal Control Contract"); and (2) provide spay/neuter services. Under the Animal Control Contract, HHS is to provide services for the purpose of administering and enforcing the following laws: HRS § 711-1109 (Cruelty to Animals), HRS § 711-1109.3 (Cruelty to Animals, Fighting Dogs), HRS § 143-2

(License Required), HRS § 143.2.6 (Animal Desertion), and Revised Ordinances of Honolulu, chapter 3, article 5 (Animal Control), chapter 7, article 2 (Animal Nuisances (Barking and Biting Dogs; Limitation of the Number of Dogs per Household)), chapter 7, article 4 (Regulation of Dogs), chapter 7, article 6, (Cat Identification Program), and chapter 7, article 7 (Regulation of Dangerous Dogs). Animal Control Contract, Attachment A, Minimum Specifications at 1-2. The contract also requires HHS to operate and maintain an animal shelter[2] and to operate a 24-hour dispatch to receive and respond to the public's complaints concerning animals and requests for services. Id.

DISCUSSION

An "agency" subject to the UIPA is defined as follows:

> "Agency" means any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district, council; bureau; office; governing authority; other instrumentality of state or county government; **or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county** . . . .

Haw. Rev. Stat. § 92F-3 (1993) (emphasis added). The Court in Olelo instructed that a plain reading of the definition does not allow the balancing test previously applied by OIP, and instead strictly applied the highlighted language disjunctively. In other words, a "corporation or other establishment" is an "agency" if it is (1) owned; **or** (2) operated; **or** (3) managed by the state or any county; **or** (4) managed on behalf of the state or any county. Relevant here, the Court construed the language "on behalf of" to mean "representative of" and concluded that "[i]t would . . . appear that an entity is a representative of the State when it substitutes for the state in the performance of a governmental function." Olelo, 116 Haw. at 350, 173 P.3d at 497.

The question posed here thus is whether HHS is managed on behalf of the City, i.e., whether HHS "substitutes for the [City] in the performance of a governmental function." Id. However, the Court in Olelo did not define the term "governmental function," and it is not a defined term under the UIPA. Further, our research has revealed no Hawaii case law directly on point.

"Government function" is defined generally as "[a] government agency's conduct that is expressly or impliedly mandated or authorized by constitution,

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[2] To this end, the City has leased property known as the Waiaka dog pound to HHS for use as an animal shelter and/or pound and related purpose. Fees collected by HHS at the shelter are to be paid to the City.

statute, or other law and that is carried out for the benefit of the general public." Black's Law Dictionary 716 (8th ed. 2004). OIP believes that law enforcement, which requires exercise of police power, falls squarely within this definition. "Police power" includes "a state's Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments." Black's Law Dictionary 1196. OIP therefore concludes that when the State, or any county in turn, delegates law enforcement duties and functions to a public-private hybrid entity, the entity must be found to substitute for the State or county in the performance of a "governmental function."

With respect to animal control laws, state statute delegates enforcement of certain laws to the counties and also authorizes the counties to contract with organizations like HHS to, among other things, operate an animal shelter; respond to animal complaints and requests for assistance; seize, impound and euthanize animals; and provide animal control officers who are granted law enforcement powers. See Haw. Rev. Stat. § 143-15 and -16 (1993) ("Any county may contract with any society or organization formed for the prevention of cruelty to animals, or similar dog protective organization, for the seizure and impounding of all unlicensed dogs, and for the maintenance of a shelter or pound for unlicensed dogs, and for lost, strayed, and homeless dogs, and for the destruction or other disposition of seized dogs not redeemed . . . ."); see also Haw. Rev. Stat. § 143-7 (1993) (authorizing counties to establish and maintain dog pounds and to provide for animal control officers who shall have all the powers of a sheriff or police officer in carrying out the chapter). Pursuant to this authority, the City has entered into the Animal Control Contract with HHS.

Because the Animal Control Contract delegates the City's duty to enforce certain animal control laws designated in the contract, OIP concludes that when HHS enforces such laws it substitutes for the City in performing a governmental function. Two cases from other states, analyzing whether similar entities perform a "government function" when enforcing animal control laws, concluded likewise, although reaching opposite conclusions on the question of whether those entities were subject to their respective public disclosure laws. See Connecticut Humane Society v. Freedom of Info. Comm'n, 591 A.2d 395 (Conn. 1991); Clarke v. Tri-Cities Animal Care & Control Shelter, 181 P.3d 881 (Wash. App. 2008). The courts in both states used a balancing test, often termed the "functional equivalent" test, derived from federal law interpreting the federal Freedom of Information Act ("FOIA") to determine whether public/private hybrid entities are subject to FOIA. See Connecticut Humane Society, 591 A.2d at 397 & n.3; Tri-Cities Animal Care, 181 P.3d at 884 (citing to Telford v. Thurston County Bd. of Comm'rs, 974 P.2d 886, review denied, 138 Wn.2d 1015 (1999), which adopted test based upon federal law). This test balances the same four factors OIP had previously balanced under its termed "totality of the circumstances" test. See OIP Op. Ltr. Nos. 90-31 and 02-08

(balancing same four factors based upon federal law). Although this balancing test was rejected by the Court in Olelo, the cases still provide guidance as to the one factor balanced under the test, which is whether a hybrid entity performs a "government function."

In Connecticut Humane Society, the court found that the society did perform government functions insofar as it engaged in statutorily authorized activities of law enforcement in enforcing animal control and cruelty laws and arguably in the detention, shelter and euthanasia of animals. Connecticut Humane Society, 591 A.2d at 399 (law enforcement is traditionally a function of government; legislation protecting animals from cruelty and neglect a valid exercise of police power). However, the court did not find this to be enough to treat the society as a "public agency" for purposes of its freedom of information statute when balanced against other factors, such as the fact that the society was not required to do so by statute and that the state still retained the predominant role in the area of animal control.

The Washington court in Tri-Cities Animal Care reached the opposite result. Tri-Cities Animal Care, 181 P.3d 881. The court concluded that a privately-run corporation, Tri-Cities Animal Care & Control ("TCAC"), contracted to provide animal control services for a tri-city area, is an agency for purposes of Washington's public disclosure act ("PDA"). Id. Specifically, the court found that TCAC substituted for local government in performing a government function because TCAC was by statute granted the ability to execute police powers in carrying out duties that included the impounding and destroying of animals. Id. at 885 (noting that these types of acts implicate due process concerns and require compliance with the same constitutional and statutory restrictions imposed on law enforcement officers when exercising police powers). The court further reasoned that the delegation of this function by contract "merely allows TCAC to step into the shoes of the local government" but does not extinguish responsibility under the PDA for public disclosure: "In short, while the local government can delegate the performance *authority* for this public function to a private entity, it cannot delegate away its statutory responsibility to perform within PDA legal requirements. . . . were we to conclude that TCAC is not a functional equivalent of a public agency, we would be setting a precedent that would allow governmental agencies to contravene the intent of the PDA and the public records act by contracting with private entities to perform core government functions." Id. at 885-86.

Like the local governments in those cases, the City has through the Animal Control Contract delegated its "performance authority" for the enforcement of animal control laws to HHS. Among other things, the contract requires HHS' employees, appointed as special deputies under the Honolulu Police Department, to investigate violations of law and to issue citations. See Animal Control Contract, Attachment B at 9 (HHS' "Manager of Field Services and Human Investigators are all special deputies under the Honolulu Police Department and are able to issue

citations to violators as appropriate."); see also Haw. Rev. Stat. § 711-1110 (providing that agent of any prevention of cruelty to animals society may be appointed to make arrest for violation of cruelty to animals statute). HHS' services also include the impounding and euthanasia of animals. See Animal Control Contract, Attachment A at 1-2 and Attachment B at 8-10, 21.

Based upon the foregoing, OIP concludes that HHS substitutes for the City in the performance of a government function when enforcing animal control laws[3] and, therefore, is an "agency" subject to the UIPA to the extent of those activities.[4] Given the State's "policy of conducting government business as openly as possible" and because the term "agency" was intended to be comprehensive, OIP agrees with the Washington court's further reasoning that, when a hybrid entity "substitutes" for government in performing a "governmental function," it must also be responsible for the attendant disclosure responsibilities. Haw. Rev. Stat. § 92F-2 (1993); see OIP Op. Ltr. No. 90-31 at 6 (UIPA based upon Model Code; commentary to Code explains that term "agency" is intended to be comprehensive); Tri-Cities Animal Care, 181 P.3d 885-86. To conclude otherwise would contravene the intent and underlying policies of the UIPA because it would result in the public's loss of its right to access government records related to a core government function whenever the government contracts with a private entity to perform that function. See generally Tri-Cities Animal Care, 181 P.3d at 885-86. HHS must, therefore, disclose records maintained in the performance of its animal control law enforcement duties in accordance with the UIPA.

OIP further concludes that records related to the Cat Lady Investigation are likely substantially maintained as part of those duties. Because this appeal presented the threshold issue of whether HHS is an "agency" subject to the UIPA, OIP has not reviewed any of HHS' records. Thus, OIP offers the following general guidance to HHS regarding disclosure.

An agency may generally withhold records that are part of an ongoing criminal investigation to protect the privacy of the individual that is the subject of that investigation and where disclosure of investigative records would frustrate the purpose of the investigation. See Haw. Rev. Stat. §§ 92F-13(1) and -13(3) (1993); OIP Op. Ltr. No. 91-9; OIP Op. Ltr. No. 95-21. However, it is likely given the breadth of the record request that there are some records that must be disclosed

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[3] Indeed, HHS itself considers the animal care and control program to be an "essential government service" that is part of the government's responsibility to keep the community safe. See Animal Control Contract, Attachment B at 2.

[4] OIP does not here conclude that all of HHS' records are subject to disclosure under the UIPA. The request here did not involve records related to HHS' dog licensing services or spay/neuter services provided to the City. Thus, this opinion does not address disclosure of HHS' records related to those services.

because they do not fall within those exceptions, such as records that have already been made public. OIP also notes that, after an investigation is closed, exceptions may be applicable that allow an agency to maintain protection of portions of the investigation, such as information that would reveal the identity of a confidential informant. See Haw. Rev. Stat. § 92F-13(3). See OIP Op. Ltr. No. 99-7. OIP is available to provide HHS with assistance in determining application of the UIPA's provisions to the records requested.

RIGHT TO BRING SUIT

By copy of this Decision to the agency, OIP hereby notifies the agency of its determination that the record be disclosed. Haw. Rev. Stat. § 92F-15.5(b) (1993) (If OIP's decision is to disclose, OIP shall notify agency of its decision "and the agency shall make the record available."). However, OIP advises HHS that it may seek a judicial determination as to whether it is an agency subject to the UIPA. Olelo, 116 Haw. at 346, 173 P.3d at 493 (courts will determine *de novo* question of whether an entity is an "agency" under the UIPA).

OIP also notifies Requester that Requester may appeal the agency's denial of access to the circuit court. See Haw. Rev. Stat. §§ 92F-15 and -15.5(a) (1993). This action must be brought within two years after the agency denial. If Requester prevails, the court will assess against the agency Requester's reasonable attorney's fees and costs incurred in the action. Haw. Rev. Stat. § 92F-15(d). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. Haw. Rev. Stat. § 92F-15.3 (Supp. 2008).

OFFICE OF INFORMATION PRACTICES

Cathy L. Takase
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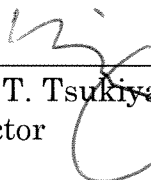
APPROVED:



Paul T. Tsukiyama
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