June 12, 1990

MEMORANDUM

TO: The Honorable Herbert K. Muraoka
Director, Building Department
City and County of Honolulu

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection and Duplication of Building Plans and Permit Applications

This is in reply to your letter dated December 27, 1989, requesting an advisory opinion concerning public access to building plans submitted to the Building Department as part of an application for a building permit.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), building permit applications and building plans within the control of the Building Department ("Department") are subject to public inspection and duplication.

BRIEF ANSWER

Under the UIPA, each agency must disclose "building permit information" within its control. Recognizing that it was not the intention of the Legislature that the UIPA close access to records which were available for public inspection before the passage of the new records law, applications for building permits and building plans must be available for public inspection after the issuance of a building permit. Further, based on the legislative history of the UIPA and liberally construing section 92F-12(a)(11), Hawaii Revised Statutes, we conclude that these

government records must be available for public inspection before a building permit has been granted, provided that the records are "within the control" of the Department.

With respect to the duplication of building plans, we note that under the Copyright Act of 1976, 17 U.S.C. § 101-810 (1988), architectural plans may be subject to copyright protection. However, federal copyright laws do not except the inspection and duplication of copyrighted architectural plans under section 92F-13(4), Hawaii Revised Statutes, as the only court to expressly address this question held that the Copyright Act of 1976 does not constitute a nondisclosure statute under the federal Freedom of Information Act's ("FOIA") exemption for records which are "specifically exempted from disclosure by statute." Although the U.S. Department of Justice has suggested that disclosure of agency records that are copyrighted does not subject an agency to copyright infringement liability based upon the "fair use" doctrine, we recommend that government agencies seek guidance from the Department of the Attorney General or the county's Corporation Counsel, as appropriate, before permitting the duplication of architectural plans where the agency is on notice that such plans are subject to a registered copyright. With respect to building plans that are not subject to a registered copyright, they may be copied by the public, since under the UIPA, any government record which may be inspected by the public may also be copied.

FACTS

Section 18-3.1 of the Revised Ordinances of Honolulu, requires the issuance of a permit by the Department before the erection, construction, alteration, repair, improvement, or demolition of any building or structure. To obtain a permit, it is necessary to file an application which, among other things, identifies the work to be covered, describes the land on which the work is to be performed, and indicates the use or occupancy for which the proposed work is intended. Rev. Ord. Hon. § 18-4.1 (1983 ed.). With each application for a permit, three sets of plans and specifications must be submitted to the Department, one of which is submitted to the Department of Health, State of Hawaii. Rev. Ord. Hon. § 18-4.2 (1983 ed.). Upon receipt of the building plans and specifications, they are reviewed by the Department for their conformity with the building code and

other pertinent laws and ordinances. Rev. Ord. Hon. § 18-5.1 (1983 ed.).

Following the issuance of a building permit by the Department, the plans and specifications submitted by the permittee are placed on microfilm and the original plans and specifications are given to the building inspector who keeps the plans until after the completion of the construction project. Thereafter, the building inspector may, and usually does, discard the original plans and specifications.

In the past and at present, all building plans for which permits have been approved are made available for public inspection. However, it has been the practice of the Department not to permit the duplication of any building plans without the building owner's authorization.

Apparently, the Department does not permit the duplication of building plans without the pertinent property owner's authorization, out of concern that the disclosure of such data may present security problems for commercial or residential property owners, and due to the possibility that architects may have some proprietary rights in building plans they have drafted. The attorney for a tenants association has made a request to the Department for copies of building plans relating to the remodeling of a low income housing project in downtown Honolulu. This attorney wishes to verify, on behalf of his client, whether improvements to the housing project comply with applicable codes and ordinances. Because the owner would not authorize the reproduction of the building plans, the Department permitted the tenants association to inspect, but not copy the building plans. The Department requests an advisory opinion concerning the public's right, if any, under the UIPA to inspect and copy building plans maintained by the Department.

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). Additionally, in section 92F-12, Hawaii Revised Statutes, the Legislature established a list of government records, or information set forth therein, that shall be available for public inspection and copying, "[a]ny provision

to the contrary notwithstanding." Haw. Rev. Stat. § 92F-12(a) (Supp. 1989). With respect to building permit records, section 92F-12(a)(11), Hawaii Revised Statutes, provides:

> **§92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:
>
> . . . .
>
> (11) Building permit information within the control of the agency; . . . . [Emphasis added.]

A. Public Access After the Issuance of a Building Permit

Of the list of disclosable government records enumerated in section 92F-12, Hawaii Revised Statutes, many were included in the UIPA as a result of the findings and recommendations of the Governor's Committee on Public Records and Privacy ("Governor's Committee").[1] On the subject of building permit records, the Governor's Committee Report states:

> The last set of records discussed was those relating to building permits. This has been a surprisingly complex subject. The permit itself, once granted, is public record and that is not in dispute. What is in dispute is the availability of the application and the file prior to the granting of that permit.

Vol. I Report of the Governor's Committee on Public Records and Privacy 148 (1987) (emphasis in original). Similarly, in written testimony submitted to the Judiciary Committee of the State House of Representatives, the Corporation Counsel for the City and County of Honolulu acknowledged that after a permit is granted, building permit applications, building plans, and permits are "public records." See A Bill for an Act Relating to Public Records, Hearing on H.B. No. 2002 before the House Judiciary Committee 14th Leg., Reg. Sess. (1988) (written testimony of Richard D. Wurdeman, Corporation Counsel, City and County of

[1]See, e.g., S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Honolulu, dated February 9, 1988). See also Op. Corp. Counsel Hon. No. M83-54 (Oct. 12, 1983).

In our opinion, the phrase "building permit information," within the meaning of section 92F-12(a)(11), Hawaii Revised Statutes, includes the permit application and building plans. First, the disclosure provisions of the UIPA must be liberally construed in order to "[p]romote the public interest in disclosure." Haw. Rev. Stat. § 92F-2 (Supp. 1989). As a corollary to this rule of statutory construction, any ambiguity in the disclosure provisions of the UIPA should be resolved in favor of disclosure.[2] See, e.g., South Coast Newspapers, Inc. v. City of Oceanside, 206 Cal. Rptr. 527 (Cal. App. 1984); Sheridan Newspapers, Inc. v. City of Sheridan, 660 P.2d 785 (Wyo. 1983). Additionally, it was not the intention of the Legislature that the UIPA be used to "close currently available records, even though these might fit within" one of the UIPA's exceptions to access. S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). Thus, there is no reason that permit applications and building plans, after the issuance of a permit, should not be subject to disclosure under the UIPA, given their availability before its enactment.

Lastly, the case of State v. Mayo, 236 A.2d 342 (Conn. 1967), supports this construction of section 92F-12(a)(11), Hawaii Revised Statutes. In Mayo the court held that documents offered in support of applications for city building permits, such as plans and specifications, were, like the applications themselves, "public records" under Connecticut's "right to know" statute.

B. Public Access Before the Issuance of a Building Permit

We next must consider whether "building permit information," as construed above, is subject to public inspection before the issuance of a building permit by the Department. As noted in the Report of the Governor's Committee, before the enactment of the UIPA, considerable disagreement existed concerning access to

[2]Exceptions to the UIPA's disclosure provisions should be narrowly construed, with all doubts resolved in favor of disclosure. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 361-61, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

building permit files, before the issuance of a building permit by the Department. Specifically, in the past, building permit applications submitted to the Department were not available for inspection before the issuance of a permit "based on the general view that `applications' are not public record[s]." Vol. I Governor's Committee Report at 148. This observation appears to be based upon the Honolulu Corporation Counsel opinion cited above, in which it was concluded that because an applicant could withdraw his or her application (and the building plans that are part of the application) at any time before the issuance of a permit, they were the "private property of the applicant" and, therefore, were not "public records" under former section 92-50, Hawaii Revised Statutes. Importantly, however, as to "building permit information," the UIPA only requires that such records be "within the control of the agency." See Haw. Rev. Stat. § 92F-12(a)(11) (Supp. 1989). Ownership of a particular government record is irrelevant for purposes of section 92F-12(a)(11), Hawaii Revised Statutes.

The Governor's Committee also noted the view by some that access to the permit file before the issuance of a permit is crucial:

> As a committee member noted, access to the application is necessary if community associations or neighbors are going to be able to support or challenge projects.

Governor's Committee Report at 148.

Recognizing that section 92F-12(a), Hawaii Revised Statutes, must be liberally construed to "[p]romote the public interest in disclosure," and that any doubts in the application of the UIPA's disclosure provisions must be resolved in favor of disclosure, we conclude that "building permit information," such as the permit application and proposed construction plans, that is within the control of the Department, is subject to public inspection before the issuance of the permit. Had the Legislature intended to deny access to building permit information until after such time as a permit has been granted, it could have unequivocally imposed such a limitation. Thus, if portions of the permit file are circulated to other agencies for review and approval, a request to inspect those records must be directed to the agency with "control" of the documents.

Lastly, neither of the exceptions set forth at section 92F-13(1) and (3), Hawaii Revised Statutes, would protect from disclosure "building permit information within the control of the agency," as the legislative history of the UIPA makes clear that as to the information set forth in section 92F-12, Hawaii Revised Statutes, "the [UIPA] exceptions such as for personal privacy and for frustration of legitimate government function are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

C. Duplication of Building Plans

The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1988), and the Berne Convention Implementation Act of 1988,[3] permit the copyrighting of "diagrams, models and technical drawings, including architectural plans." A statutory copyright in architectural plans clearly protects against unauthorized plans copied therefrom. 1 Nimmer on Copyright § 2.08[D] at 2-115 (1989 ed.).[4]

Whether government records in which third parties hold a registered federal copyright are subject to duplication under the UIPA presents a difficult question, since under the UIPA, an agency is not required to disclose "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1989). However, thus far, the only federal court which, to our knowledge, has addressed this issue concluded that the Copyright Act of 1976 is not a statute which expressly exempts records from disclosure under FOIA's Exemption (3), which protects from mandatory disclosure, agency records which are "specifically exempted from disclosure by statute." See 5 U.S.C. § 552(b)(3) (1989). Specifically, in St. Paul's Benevolent Ed. & Miss. Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980), the court found that agency records subject to federal copyright protection

[3]Berne Convention Implementation Act of Oct. 31, 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[4]There is a divergence of opinion concerning whether a copyrighted architectural plan prevents the unauthorized construction of a structure based upon those copyrighted plans. See generally, 1 Nimmer on Copyright § 2.08[D] (1989 ed.). This is not an issue within the scope of this opinion letter.

were not exempt from disclosure under FOIA, because the Copyright Act of 1976 does not prohibit disclosure of copyrighted works. On the contrary, the court found it specifically permits public inspection of copyrighted documents. See 17 U.S.C. § 705(b). Similarly, the United States Department of Justice, Office of Information and Privacy, has concluded that "[o]n its face, the Copyright Act simply cannot be considered a `nondisclosure statute.'" Vol. IV, No. 4, FOIA Update, OIP Guidance: Copyrighted Materials and the FOIA at 3-5 (Fall 1983) (hereinafter "FOIA Update").

However, a conclusion that copyrighted materials are not protected from agency disclosure under Exemption 3 of FOIA, or under section 92F-13(4), Hawaii Revised Statutes, presents the possibility that an agency would be forced by law to permit or participate in the duplication of a copyrighted work, and in doing so, subject itself to an infringement claim by the owner of the copyright. Thus, in Weisenberg v. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980), the court concluded that the trial court should have joined a copyright owner as an indispensable party to a FOIA suit, due to the substantial risk that the government would be subject to an infringement claim as a result of mandatory FOIA disclosure. On remand, the Weisenberg case was settled, thus, no Federal Appeals Court has directly ruled on the relationship between FOIA and the Copyright Act of 1976.

One commentator has noted the apparent absence of any judicial decisions which directly address whether copyrighted materials are subject to duplication under state open records statutes. See Kidwell, Open Records Laws and Copyright, 5 Wis. Law Rev. 1021, 1029 (1989). Two attorney general opinions from other states, however, have concluded that the federal Copyright Act of 1976 preempts state open records laws which, like the UIPA, permit the duplication of public records by members of the public.

In MW-307 Op. Att'y Gen. Tex. 980 (1981), the Texas Attorney General opined that copyrighted maps showing the locations of oil drilling activity were not required to be available for public copying under the state's Open Records Act, because the Copyright Act of 1976 gives the copyright holder the exclusive right to reproduce his or her work, and a state that infringes a copyright may be liable in damages to the holder, citing Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979). Therefore, the Texas

Attorney General's office concluded that under the state's Open Records Act, copyrighted materials could be inspected by the public, the public could make copies thereof unassisted by the state, but in doing so, assume the risk of an infringement suit. Similarly, in 82-63 Op. Att'y Gen. Fla. 148 (1982), the Florida Attorney General opined that the Florida open records law was preempted by the federal Copyright Act, such that copyrighted works could be inspected by the public, but not copied without the copyright owner's consent. See generally Kidwell, Open Records Laws and Copyright, 5 Wis. Law Rev. 1021, 1027-31 (1989).

On the other hand, the U.S. Department of Justice has taken the position that duplication of copyrighted works under the FOIA should not subject an agency to copyright infringement liability. Specifically, under the doctrine of "fair use," a person other than the copyright owner is given a privilege to duplicate a copyrighted work for such purposes as criticism, comment, news reporting, teaching, scholarship, or research. See 17 U.S.C. § 107 (1988). In its Fall 1983 FOIA Update, the U. S. Department of Justice asserted that a FOIA disclosure of copyrighted material submitted by others constitutes a "fair use" reasoning:

> [T]he overriding consideration in determining that a particular use is a "fair use" under the Copyright Act, and thus not a copyright infringement, is the public interest in unrestricted access to the information. See A. Latman & R. Gorman, Copyright for the Eighties 473 (1981); see also Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966), cert denied, 385 U.S. 1009 (1967). Given that the FOIA is designed to serve the public interest in access to information maintained by the government, see, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), disclosure of nonexempt copyrighted documents under the FOIA should be considered a "fair use."

FOIA Update at 5.

We do not decide whether State-sanctioned reproduction of copyrighted material under the UIPA constitutes a "fair use," thereby insulating an agency from liability for copyright infringement. Rather, we merely point out that the reproduction of architectural plans without the authorization of the owner of

a registered copyright may be governed by statutes other than the UIPA. If a government agency is on notice that architectural plans within its control are subject to a registered copyright under the federal Copyright Act of 1976, it should contact the Department of the Attorney General, or its Corporation Counsel, as appropriate, for legal guidance concerning whether the reproduction of such plans would subject it to liability for copyright infringement.

It should be noted, however, that under most standard agreements between owners and architects, architects retain ownership of any architectural plans. See Standard Form of Agreement Between Owner and Architect, Article I, AIA Document B141 (1977). Further, ownership of a copyright in architectural plans will usually be by the "author" of such plans, the architect. Thus, it would appear that the Department's past practice of requiring the building owner's consent would not insulate the Department from an infringement claim by an architect owning a registered copyright in such plans.

We now address the Department's policy of requiring a building owner's authorization before permitting the duplication of building plans submitted to the Department as part of an application for a building permit, where the Department is not on notice that a third party is the holder of a registered copyright in such plans. The UIPA, like other open records laws, does not recognize degrees of disclosure, such as allowing the inspection, but not the duplication of government records. Thus, section 92F-11(b) and (d), Hawaii Revised Statutes, provide:

> (b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.
>
> . . . .
>
> (d) Each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts. [Emphasis added.]

See also Julian v. Department of Justice, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986) (the federal Freedom of Information Act "speaks in terms of disclosure and nondisclosure. It does not recognize

degrees of disclosure such as permitting viewing, but not copying, of documents").[5]5 Therefore, under the UIPA, any government record that may be inspected by the public may also be copied.

CONCLUSION

Under the UIPA, each agency must disclose, as a matter of public policy, "building permit information" within its control. As we construe section 92F-12(a)(11), Hawaii Revised Statutes, we conclude that building permit applications and plans are subject to inspection by the public both before and after the issuance of a building permit. Further, as to those building plans which are not subject to copyright protection under the Copyright Act of 1976, the public may also copy such plans, since under the UIPA, any government record which may be inspected by the public may also be copied.

Hugh R. Jones
Staff Attorney

HRJ:sc
cc: Wayson Chow, Esq.

APPROVED:

Kathleen A. Callaghan
Director

[5]See also S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1094 (1988) (The law "is expanded to explicitly include the right to duplicate public records").