December 31, 1990

MEMORANDUM

TO: Joseph K. Conant
Executive Director
Housing Finance Development Corporation

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of Housing Finance Development Corporation Lease Rent Arbitration Decisions and Awards

This is in reply to your request for an advisory opinion concerning whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the public may inspect and copy lease rent arbitration awards maintained by the Housing Finance Development Corporation ("HFDC").

ISSUE PRESENTED

Whether, under the UIPA, the public may inspect and copy lease rent arbitration decisions and awards issued by the HFDC, or its designated arbitrator, pursuant to chapter 519, Hawaii Revised Statutes, and rules adopted by the HFDC thereunder.

BRIEF ANSWER

We conclude that lease rent arbitration awards issued by the HFDC or its "appointed designee" constitute "final opinions" or "orders made in the adjudication of cases" under section 92F-12(a)(2), Hawaii Revised Statutes, and therefore, must be made available for inspection and copying during regular business hours.

Although lease rent arbitration proceedings under chapter 519, Hawaii Revised Statutes, are not "contested cases" under the State's Administrative Procedure Act, based upon identical provisions of the federal Freedom of Information Act and authorities interpreting the same, we conclude that nothing would support a conclusion that this UIPA section applies only to adjudications involving a formal hearing. In our opinion, section 92F-12(a)2), Hawaii Revised Statutes, applies to agency action of particular applicability in which the legal rights, duties, privileges, or other legal interests of specific persons are determined by the agency based upon statutorily or administratively defined standards.

FACTS

If the parties to a lease[1] of a residential lot[2] existing on June 2, 1975, or entered into thereafter, which provides for the reopening of the contract for renegotiation of lease rent terms are unable to reach agreement, then upon the agreement of the parties, the HFDC or its "designee" may arbitrate the dispute. See Haw. Rev. Stat. § 519-2(b) (Supp. 1989). The findings of the HFDC or its "designee" in the lease rent arbitration proceeding are binding and conclusive as to both parties. Haw. Rev. Stat. § 519-2(b) (Supp. 1989). Under section 519-2(b), Hawaii Revised Statutes, an "arbitration proceeding" means "the actual arbitration conducted by the [HFDC] or its designee pursuant to a contract executed by and among the lessees, lessor, and the arbitrator detailing among other things, the following: description of properties involved, time of performance, compensation, method of payment, settlement and other procedures, and termination."

Pursuant to its rulemaking powers, the HFDC has adopted administrative rules implementing chapter 519, Hawaii Revised Statutes. Under the HFDC's rules, after the parties to an eligible lease have requested arbitration, the HFDC may appoint

[1]A "lease" is defined by section 516-1, Hawaii Revised Statutes, as "a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term . . . twenty years or more."

[2]A "residential lot" is defined by section 516-1, Hawaii Revised Statutes, as "a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families."

an arbitrator from its staff, or may "appoint a designee" from the private sector to arbitrate the dispute. See section 15-81-13(a), Hawaii Administrative Rules ("Haw. Admin. Rules"). According to the HFDC's rules, in order to be appointed as an arbitrator by the HFDC, a person must be a qualified real estate appraiser with a minimum of three years experience, and have completed American Arbitration Association ("AAA") sanctioned training in arbitration procedures, or 1) have been admitted to the panel of the AAA, 2) performed three real property arbitrations as an arbitrator, or 3) be mutually selected by both parties. See Haw. Admin. Rules § 15-18-139(c) (1988). With respect to the arbitration proceedings, the HFDC's rules provide:

> **§15-81-14 Arbitration proceedings.** (a) The arbitrator shall pursue the arbitration of the renegotiations in accordance with the arbitration services contract and chapter 658, HRS.
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> (b) The arbitrator shall render an award, a copy of which the arbitrator shall send to each party and the [HFDC]. The award shall be completed not later than thirty days from the date of the last hearing.
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> (c) The [HFDC] shall not participate in the arbitration proceedings where it has designated an arbitrator from the private sector to arbitrate the case, provided the [HFDC] shall monitor the proceedings and may act as a resource in the arbitration.

Haw. Admin. Rules § 15-81-14 (1988).

Section 519-2(a)(2), Hawaii Revised Statutes, generally provides that upon renegotiation, the lease rent payable shall not exceed the amount derived by multiplying the "owner's basis" by four percent. In a recent HFDC lease rent arbitration proceeding, the lessor sought an increase in lease rent over the remaining years of the lease term in three incremental steps or phases. The attorney for the lessee argued that such a formula would result in the payment of rent in an amount exceeding four percent of the owner's basis, during the second phase of increased lease rent and was, therefore, prohibited by chapter 519, Hawaii Revised Statutes.

In support of its position that an award of renegotiated rent in three separate phases was permissible under chapter 519, Hawaii Revised Statutes, the lessor introduced into evidence three past arbitration decisions in which the arbitrator awarded a renegotiated lease rent, increased in three steps over the remaining term of the lease. It has been the HFDC's past practice of adhering to Canon VI of the Code of Ethics for Arbitrators in Commercial Disputes, which provides, "[u]nless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."

Because the particular lessor is the fee owner of hundreds of residential lots, it had been a party to other arbitration proceedings under chapter 519, Hawaii Revised Statutes, and was able to use prior arbitration award decisions as precedent in a pending dispute. On the contrary, the lessee, who was not a party to those prior proceedings, did not have access to any prior arbitration decisions because of the HFDC's past practice of treating the award decisions as confidential.

The HFDC requests an advisory opinion, concerning whether under the UIPA, arbitration decisions and awards rendered under chapter 519, Hawaii Revised Statutes, are subject to public inspection and copying.

DISCUSSION

The UIPA, the State's new open records law, generally provides that "[a]ll government records are open to inspection and copying unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). In addition to this general rule of agency disclosure, in section 92F-12, Hawaii Revised Statutes, the Legislature enumerated a list of records, or categories of records, which must be made available for inspection as a matter of law.[3] Section 92F-12, Hawaii Revised Statutes, provides in pertinent part:

[3]As to the records, or categories or records set forth at section 92F-12, Hawaii Revised Statutes, the legislative history of the UIPA indicates that the Act's exceptions to public access, "such as for personal privacy and for frustration of legitimate government function are inapplicable." See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

> **§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:
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> (1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
>
> (2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases; . . . .

Haw. Rev. Stat. § 92F-12(a)(1), (2) (Supp. 1989) (emphasis added).

If lease rent arbitration decisions and awards issued by the HFDC constitute "final opinions" or "orders made in the adjudication of cases," such awards must be available for public inspection under the UIPA. We now turn to a determination of whether the HFDC's arbitration awards are within the scope of section 92F-12(a)(2), Hawaii Revised Statutes.

Paragraphs (1) and (2) of section 92F-12(a), Hawaii Revised Statutes, were adopted in their entirety from section 2-101 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws. The UIPA's legislative history directs those construing its provisions to consult the Model Code's commentary, where appropriate, to guide the interpretation of similar UIPA provisions. See H.R. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). The commentary to section 2-101 of the Model Code states:

> Under this section, the "law of the agency" must be made available to the public. In other words, an agency may not maintain "secret law" relating to its own decisions and policies. This section is similar in general requirement to Sections (a)(1), (2) and (3) of the federal Freedom of Information Act 5 U.S.C. § 552(a)(1), (2) and (3). . . . The affirmative disclosure responsibility extends to

> agency policies, rules and adjudicative determinations and procedures.

Indeed, section 92F-12(a)(2), Hawaii Revised Statutes, is identical to section 552(a)(2)(A) of the federal Freedom of Information Act, 5 U.S.C. § 552(a)(2)(A) (Supp. 1989) ("FOIA").[4] It is a cardinal rule of statutory construction that statutes that are in pari materia, or upon the same subject matter, should be construed together, as an aid to arriving at the meaning of the statute under consideration. See Haw. Rev. Stat. § 1-16 (1985). Thus, authorities applying section 552(a)(2)(A) of FOIA, provide useful guidance in applying identical provisions of the UIPA.

In interpreting section 552(a)(2)(A) of the FOIA, it is essential to review the definitions of the terms "order," "opinion," and "adjudication" contained in the federal Administrative Procedure Act, 5 U.S.C. § 551 (Supp. 1989) ("APA"). Under the federal APA an "adjudication" means "agency processes for the formulation of an order." 5 U.S.C. § 551(7). The term "order" under the federal APA means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 552(6). Given these expansive definitions, it is not surprising that a wide variety of agency actions have been held to be subject to public inspection under the federal FOIA. Indeed, in a memorandum concerning the 1974 amendments to the FOIA, the U.S. Attorney General stated:

> If these definitions were unqualifiedly applied to the present provision, they could be read as including within (a)(2)(A) [of FOIA] many items which

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[4] 5 U.S.C. § 552(a)(2)(A) provides:

> (a) Each agency shall make available to the public information as follows:
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> . . . .
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying- (A) final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases; . . . .[Emphasis added.]

> could not reasonably have been intended (for example, Park Police traffic tickets, and the millions of ministerial IRS grants of refunds of withheld taxes each year), and there would have to be excluded important matters which must have been meant to be covered (for example, opinions and decisions in ratemaking proceedings).

Attorney General's Memorandum on the 1974 Amendments to the Federal Freedom of Information Act at 20 (1975) (hereinafter "1975 Memorandum").

Similarly, one authoritative commentator has observed that under the above definitions, "[i]f the words mean what they say, when an administrator disposes of a `matter' by accepting a lobbyist's invitation to lunch, he as issued an `order' in an `adjudication.' Davis, Administrative Law Treatise § 5.13 at 352 (2d ed. 1978). The U.S. Attorney General, in its 1975 Memorandum, suggested that a permissible construction of the phrase "orders made in the adjudication of cases" would be one in accord with the FOIA's history and purpose, and would "read it as applying to structured, relatively formal proceedings, in which the agency is functioning in a quasi-judicial capacity, and in which its decision is rendered upon a consideration of statutorily or administratively defined standards." See 1975 Memorandum at 20.

There is a paucity of case law interpreting section 552(a)(2)(A) of the FOIA. However, court decisions which do exist on this subject have not embraced the U.S. Attorney General's interpretation of "adjudication." The Supreme Court broadly construed section 552(a)(2)(A) of the FOIA in National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975), such that it was held to apply to "Advice" and "Appeals Memoranda" prepared by the General Counsel for the NLRB, which set forth the General Counsel's decision not to file an unfair labor practices complaint in response to a charge filed by a private party. Noting that the FOIA represents a "strong congressional aversion to ‘secret [agency] law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law,'" the court held that a decision by the General Counsel not to file a complaint constituted a "final disposition," and therefore, an "opinion" under the FOIA. NLRB

v. Sears, Roebuck & Company, 421 U.S. at 158-59. Thus, in the Sears case, a decision not to proceed with a formal proceeding, was held to be an opinion made in the adjudication of a case.

In National Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 798 (D.D.C. 1975), the court held that decisions by the U.S. Board of Parole denying inmate parole applications were "orders made in the adjudication of cases," despite the fact that such determinations were made without a "formal hearing." The Sigler court stated, "[s]ection 552(a)(2) of the FOIA requires disclosure of all opinions and orders arising from agency adjudications, without any limitation that it apply only to adjudications pursuant to a formal hearing." Sigler, 390 F. Supp. at 792. Further, the court rejected an argument that only those orders and opinions having precedential effect must be available for public inspection under the FOIA. Id. at 795.

Lastly, in Skelton v. U.S. Postal Service, 678 F.2d 35 (5th Cir. 1982), the court held that an agency letter sent in response to a complaint filed against a postal employee was not a "final opinion" under the FOIA, reasoning:

> Skelton's original letter of complaint invoked no substantive statutory right and no statutory procedure for vindicating it. No statute directed the agency to make any determination concerning Skelton's letter. Skelton points to no statute or regulation that would make him a party to an internal disciplinary proceeding. He would not be entitled to personal relief in such a proceeding. The agency's letter responding to Skelton's complaint was thus not the adjudication of a "case" that is at all similar to the "case" at issue in Sears.
>
> Moreover, we think it extremely unlikely that Congress intended a letter sent in response to a citizen's letter of complaint be a 'final opinion' subject to . . . § 552(a)(2). That requirement was designed to help the citizens find agency statements 'having precedential significance' when he becomes involved in `a controversy with an agency' . . . . We think that by that by referring to "final opinions . . . made in the adjudication of cases," Congress

> was referring to explanations of decisions in proceedings, like that in Sears, in which a party has a right to set the agency decision making process in motion and obtain a determination concerning the statute or other laws the agency is charged with interpreting and administering.

Skelton, 678 F.2d at 40-41 (emphasis added).

On the other hand, Hawaii's Administrative Procedure Act, chapter 91, Hawaii Revised Statutes, which was modeled after the Model State Administrative Procedure Act drafted by the National Conference of Commissioners on Uniform State Laws in 1961, does not use or define the term "adjudication" to define a type of agency action. Similarly, unlike the federal APA, chapter 91, Hawaii Revised Statutes, does not define the term "order." While like the federal APA, agencies act in either adjudicatory or rulemaking capacities, under chapter 91, Hawaii Revised Statutes, the agencies act in an adjudicatory role only when involved in a "contested case." A contested case means:

> [A] proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

Haw. Rev. Stat. § 91-1(5) (1985) (emphasis added). Under the above definition, a contested case hearing is one that is required by either statute or by the constitution, before agency action. See Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 522 P.2d 1255 (1974). Thus, under the State APA, an agency acts in an adjudicatory capacity in a more narrow range of cases than under the federal APA.

Additional guidance in determining the meaning of the term "order" for purposes of the UIPA, may be gleaned from the National Conference of Commissioners on Uniform State Laws' State Administrative Procedure Act of 1981 ("Model Act"). Section 1-102(5) of the Model Act defines the term "order" as:

> [A]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons.

Model Act § 1-102(5) (1981).

We concur with the observations expressed by Professor Davis, and the U.S. Attorney General in its 1975 Memorandum, that the federal APA definition of the term "order" is difficult to apply with any precision. In our opinion, the definition of the term "order" set forth in the Model Act provides a more practical and workable definition of this term. This definition clearly describes the action of an agency when acting in a quasi-judicial or adjudicatory capacity, by determining the legal rights, duties, privileges or other legal interests of specific persons. In our opinion, an agency may act in such a quasi-judicial, or adjudicatory capacity, in contexts other than "contested case" hearings under chapter 91, Hawaii Revised Statutes.

For example, section 92F-15.5, Hawaii Revised Statutes, establishes a person's right to bring an administrative appeal before the OIP if denied access to a government record under the UIPA, in accordance with rules established under section 92F-42(12), Hawaii Revised Statutes. The UIPA expressly provides that this administrative appeals process "shall not be a contested case under chapter 91." See Haw. Rev. Stat. § 92F-42(1) (Supp. 1989). However, the UIPA administrative appeal process is nonetheless "adjudicatory," and the decisions of the OIP constitute a form of agency action in which the rights of specific persons are determined in accordance with statutorily or administratively defined standards.

Regardless, whether reliance is placed upon the federal APA definition of the term "order" or the one set forth by the Model Act, we conclude that a decision of the HFDC, or its designee, which conclusively establishes the renegotiated lease rent between specific persons, is an "order" within the meaning of section 92F-12(a)(2), Hawaii Revised Statutes.

Specifically, an arbitration award is an agency action of particular applicability that determines the legal rights, duties, and privileges of specific persons. Additionally, chapter 519, Hawaii Revised Statutes, establishes a statutory cap upon renegotiated lease rent for certain real property leases, and provides a statutory mechanism whereby disputes between parties to residential leases may choose to have the HFDC or "its designee" conclusively arbitrate the dispute. In this respect, the parties to eligible residential leases have the right "to set

the agency decision-making process in motion and obtain a determination concerning the statute or other laws the agency is charged with interpreting and administering." Skelton, 678 F.2d at 40. In this regard, the HFDC or its "designee" is acting in a relatively formal proceeding "in which its decision is rendered upon a consideration of statutorily or administratively defined standards." 1975 Memorandum at 20.

Furthermore, our conclusion that HFDC arbitration awards are "orders" under the UIPA is consistent with the legislative purpose behind this UIPA provision, which is to prevent an agency from creating "secret law." As noted above, in the course of its arbitration proceedings, the HFDC or its "appointed designee" have relied upon, or at least considered, decisions made in other lease rent arbitration proceedings.

It might be argued that where the HFDC uses private sector arbitrators to resolve lease rent renegotiation disputes, there is no "agency" decision-making process involved, nor any final disposition by the HFDC. However, the HFDC is the entity setting the qualifications for such arbitrators, and which "appoints" an arbitrator, either from its staff, or from the private sector. In addition, the arbitration procedure is established by section 519-2(b), Hawaii Revised Statutes, and by HFDC rules. Lastly, while an arbitration proceeding is not a "contested case" hearing under chapter 91, Hawaii Revised Statutes, we agree with the decision of the court in Sigler, that like section (a)(2) of the FOIA, by its terms, nothing would support a conclusion that section 92F-12(b)(2), Hawaii Revised Statutes, only applies to "adjudications pursuant to a formal hearing." Sigler, 390 F. Supp. at 792.

Therefore, we conclude that lease rent renegotiation arbitration decisions and awards issued under chapter 519, Hawaii Revised Statutes, constitute "final opinions" or "orders made in the adjudication of cases," and must be made available for public inspection and copying under section 92F-12(a)(2), Hawaii Revised Statutes.[5]5

[5]We note that under the FOIA, if explained in writing, an agency is permitted to delete information from its final orders and opinions, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy. See 5 U.S.C. § 552(a)(2). Based upon our review of a sample "HFDC arbitration award, we could find no information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy under the UIPA.

CONCLUSION

Based upon the foregoing authority, we conclude that lease rent arbitration awards issued under chapter 519, Hawaii Revised Statutes, by the HFDC or its "appointed designee" constitute "final opinions" or "orders made in the adjudication of cases" under section 92F-12(a)(2), Hawaii Revised Statutes. Accordingly, such awards must be made available for inspection and copying during regular business hours.

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HRJ:sc

APPROVED:

Kathleen A. Callaghan
Director