Op. Ltr. 91-16 Draft Master Plan for Proposed Spaceport and Correspondence with the Consultant

Please note that opinions discussing the deliberative process privilege have been materially affected by the Hawaii Supreme Court's majority opinion in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (Dec. 21, 2018).

September 19, 1991

MEMORANDUM

TO: The Honorable Murray E. Towill, Director
Department of Business, Economic Development & Tourism

Attention: George W. Mead, Director
Office of Space Industry

FROM: Lorna J. Loo, Staff Attorney

RE: Draft Master Plan for Proposed Spaceport and Correspondence with the Consultant

This is in response to your letter, dated January 30, 1991, requesting an advisory opinion regarding public access to the draft of the master plan for the proposed spaceport in Ka'u, Hawaii ("master plan") and correspondence with CH2M Hill Northwest, Inc. ("CH2M Hill"), the consultant hired to prepare the master plan ("Consultant").

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Business, Economic Development and Tourism, Office of Space Industry ("DBED"), is required to make the draft of the master plan available for public inspection and copying.

II. Whether, under the UIPA, the DBED is required to make its correspondence with the Consultant available for public inspection and copying.

BRIEF ANSWER

The draft of the master plan is not required to be disclosed under the UIPA exception for "[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. 1990). We believe that the draft of the master plan is predecisional and deliberative in nature, and that its disclosure would chill agency decision-making during the preparation of the master plan. Because CH2M Hill's draft documents were solicited by the DBED and incorporated into the draft master plan, they are also a part of the deliberative process behind the master plan's preparation. Therefore, the UIPA does not require the disclosure of these drafts. See OIP Op. Ltr. No. 90-21 (June 20, 1990).

We find that the "frustration of a legitimate government function" exception also applies to the correspondence between the DBED and CH2M Hill consisting of CH2M Hill's partial drafts of the master plan and the DBED's comments and suggestions about these drafts. Although CH2M Hill is an entity outside of government, we find that CH2M Hill's drafts and consultant services comprise an important part of the DBED's deliberative process in the master plan's preparation, and that CH2M Hill's drafts and the DBED's comments about the drafts are as predecisional and deliberative as drafts and comments exchanged within or between agencies. Hence, in order to encourage candor and openness during the master plan's preparation, these correspondence records are not required to be disclosed.

However, we find that the disclosure of the DBED and CH2M Hill's correspondence concerning their negotiation of contract terms would not frustrate a legitimate government function after these terms have been finalized, because this disclosure will not (1) stifle the exchange of ideas during the DBED's decision-making, (2) give a "manifestly unfair advantage" to another party, or (3) disclose "confidential commercial or financial information." In the absence of an applicable exception, these records must be made available for public inspection and copying.

FACTS

In a contract dated December 1, 1988, the DBED hired CH2M Hill to prepare a master plan that would describe the conceptual facilities site for a proposed spaceport in Ka'u, on the island of Hawaii, and evaluate the potential constraints, risks, and benefits. Under the contract, CH2M Hill also agreed to prepare

the Draft Environmental Impact Statement ("EIS") that will set forth the potential environmental effects resulting from the construction of a spaceport.

Before the DBED can construct a spaceport, it must submit the Draft EIS to the Department of Health, Office of Environmental Quality Control ("OEQC"), in accordance with chapter 343, Hawaii Revised Statutes. The OEQC must make the Draft EIS available for public review and comment for a forty-five day period, and the DBED must respond to the public's comments received at this time. The consultant contract also provides that CH2M Hill would prepare the Final EIS, which the DBED is required to provide to the OEQC after the public comment period.

After the performance of the consultant contract began, the DBED and CH2M Hill negotiated certain changes to the original contract. Consequently, in December, 1989 and June, 1990, the DBED and CH2M Hill agreed to amendments to the consultant contract that broadened the scope of services to be rendered by CH2M Hill, extended the deadlines for their completion, and increased the compensation to be paid by the DBED. Then, in contracts dated November 21, 1990 and April 1, 1991, by agreement between the DBED and CH2M Hill, another consultant, MCM Planning, was hired to complete the preparation of the Draft EIS and the Final EIS.

The DBED has received several requests from the public for the disclosure of the master plan. The requesters want to review the master plan before the public comment period for the related Draft EIS. According to the DBED, it is still in the process of drafting, editing, and compiling information for the master plan with the assistance of CH2M Hill. When the master plan is finalized, the DBED will made it available for public inspection and copying. In July, 1991, the DBED distributed and made available for public inspection a project description of the proposed spaceport as a prelude to the master plan.

Also, several persons have requested the DBED to disclose its written correspondence with CH2M Hill, apparently in order to discover the reasons for the DBED's subsequent contract with another consultant for the preparation of the Draft and Final EIS. The correspondence between the DBED and CH2M Hill

primarily consists of: (1) drafts prepared by CH2M Hill for incorporation into the draft master plan, (2) the DBED's comments on these drafts, and (3) memoranda, letters, and other transmittals regarding the DBED and CH2M Hill's negotiation of certain terms of the consultant contract, such as the scope of work to be completed, time periods for the completion of the work, and expenses. These negotiations resulted in the amendments to the original consultant contract.

You requested an advisory opinion from the Office of Information Practices ("OIP") regarding (1) whether the master plan is required to be disclosed while it is being drafted, and (2) whether the DBED must publicly disclose the above-referenced correspondence.

DISCUSSION

I. Draft of Master Plan

Although the draft of the master plan is not a final agency document, it is still a "government record" because it constitutes "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. §92F-3 (Supp. 1990) (emphasis added). The UIPA sets forth the general rule 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. 1990).

In section 92F-13, Hawaii Revised Statutes, the UIPA provides five exceptions to the general rule. In determining whether the draft of the master plan is subject to public inspection, we believe that the UIPA exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" is relevant. Haw. Rev. Stat. § 92F-13(3) (Supp. 1990). We previously opined that this exception applies to drafts of correspondence because the disclosure of such records would frustrate agency decision-making. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts of agency correspondence).

As we discussed in OIP Opinion Letter No. 90-8, "[d]raft documents, by their very nature, are typically predecisional and deliberative. They `reflect only the tentative view of

their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" Exxon Corp. v. Dep't. of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (citation omitted). Consequently, even if a draft document's contents are factual, the disclosure of the draft would frustrate agency decision-making during the drafting and editing of the document because "the disclosure of editorial judgments--for example, decisions to insert or delete material or to change a draft's focus or emphasis--would stifle the creative thinking and candid exchange of ideas." Dudman Communications Corp. v. Dep't. of Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987); see OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

In reaching our conclusion in OIP Opinion Letter No. 90-8, we referred to case law under the federal Freedom of Information Act ("FOIA") for guidance about what government records, if publicly disclosed, would frustrate agency decision-making. Specifically, the FOIA provides a "deliberative process privilege" under the exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1988). Although the UIPA does not contain identical language as the FOIA exemption (b)(5), case law regarding this exemption is instructive in interpreting the "frustration of a legitimate government function" exception under the UIPA. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

The FOIA exemption (b)(5) covers "inter-agency or intra-agency memorandums or letters." However, case law under the FOIA has held that this FOIA exemption may also protect a government record prepared by a consultant so long as the consultant's submission of the record "was solicited by the agency" and the record is "predecisional" and "deliberative" in character. Ryan v. Dep't. of Justice, 617 F.2d 781 (D.C. Cir. 1980); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987); see OIP Op. Ltr. No. 90-21 (June 20, 1990). We previously opined that so long as these criteria are met, a government record prepared by a consultant would not be required to be disclosed under the UIPA exception based upon the "frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1990); see OIP Op. Ltr. No. 90-21 at 8 (June 20, 1990) (consultant's report).

Based upon FOIA case law, we believe that a draft government document, whether prepared by the agency or a consultant, would be protected by the "deliberative process privilege." See Chemical Manufacturers Assoc. v. Consumer Product Safety Commission, 600 F. Supp. 114 (D.D.C. 1984) (draft of study being prepared by another agency under contract); Brush Wellman, Inc. v. Dep't. of Labor, 500 F. Supp. 519 (N.D. Ohio 1980) (draft of economic impact statement prepared by private consultant). In each of these cases, the court found that the draft document prepared for the agency by an outside party was predecisional and "part of the agency give and take--of the deliberative process--by which the decision itself is made." Chemical Manufacturers Assoc., 600 F. Supp. at 118. As the courts concluded, disclosure of the drafts would "have an obvious chilling effect" and "prevent the free flow of information between the consultant" and the agency. Id.; Brush Wellman, Inc., 500 F. Supp. at 525. Further, even "[d]isclosure of the factual portions of these documents would reveal the selection process by which [the agency] formulated its final" document. Brush Wellman, Inc., 500 F. Supp. at 525.

It is important to note, however, that "`even if a draft document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.'" Arthur Anderson & Co. v. Internal Revenue Service, 679 F.2d 254, 258 (D.C. 1982) (citation omitted). In addition, the agency must be able to show "`what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" Id. (citation omitted). Thus, the mere designation of a document as a "draft" does not by itself exempt a document from public inspection required under the UIPA.[1]1

Based upon the legal authority discussed, we believe that the draft of the master plan, including those portions prepared

[1]However, we clearly recognize that although a particular government record in its final form may be available for public inspection and duplication, a previous draft of the record would not be required to be disclosed under section 92F-13(3), Hawaii Revised Statutes, in order to avoid the frustration of agency decision-making. See OIP Op. Ltr. No. 90-8 at 7 (Feb. 12, 1990).

by CH2M Hill, is "predecisional." Under the facts provided, we find no indication that the DBED has "adopted" the draft of the master plan as the official version, or that the DBED has used the draft "in its dealing with the public." See Arthur Anderson & Co. v. Internal Revenue Service, 679 F.2d 254, 258 (D.C. 1982) (citation omitted).

We also find that the draft of the master plan is a necessary part of the DBED's deliberative process in preparing the final master plan. The DBED is still making decisions about the contents of the master plan, reviewing and incorporating the drafts prepared by CH2M Hill, and editing all the information compiled for the master plan. We believe that the disclosure of the draft of the master plan would "chill" the candor and free exchange of thoughts in these agency decision-making processes. Consequently, in order to avoid the frustration of agency decision-making, the draft of the master plan is not required to be disclosed under section 92F-13(3), Hawaii Revised Statutes. We find that CH2M Hill's drafts submitted and incorporated into the draft of the master plan were solicited by the DBED, and are a part of the deliberative process behind the master plan's preparation. Therefore, the UIPA also does not require the disclosure of CH2M Hill's drafts. See OIP Op. Ltr. No. 90-21 (June 20, 1990).

We understand that members of the public and the media are concerned that the DBED will not publicly disclose the master plan before the issuance of the Draft EIS. However, the amount of time which the DBED takes to prepare and issue the master plan is generally a matter outside the scope of the UIPA. So long as the DBED is actually involved in the ongoing process of preparing the master plan and has not actually adopted it, either informally or formally, the draft of the master plan is not required to be disclosed under section 92F-13(3), Hawaii Revised Statutes.

II. Correspondence between DBED and CH2M Hill

a. CH2M Hill's Drafts and DBED's Comments and Suggestions about the Drafts

Correspondence that the DBED received from CH2M Hill and copies of correspondence that the DBED sent to it constitute "government records" because they are maintained by the DBED

and provide information "in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1990). Thus, the disclosure of the DBED's correspondence with CH2M Hill is governed by the UIPA's general rule of required public access and exceptions to this rule.

As previously discussed, we find that the drafts prepared and submitted by CH2M Hill for the draft master plan are predecisional and deliberative in character and were solicited by the DBED under the consultant contract. Therefore, we conclude that CH2M Hill's correspondence to the DBED consisting of its drafts is not required to be disclosed under the UIPA exception for "[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. 1990).

Furthermore, we believe that the DBED's correspondence to CH2M Hill setting forth the DBED's comments and suggestions concerning CH2M Hill's drafts is also predecisional and deliberative. Under FOIA case law, the "deliberative process privilege" has been found to encompass comments and suggestions provided to agency employees concerning draft documents that they prepared, including draft forest plans and draft EIS, Nat'l Wildlife Federation v. United States Forest Service, 861 F.2d 1114 (9th Cir. 1988); draft IRS publications, Cliff v. Internal Revenue Service, 529 F. Supp. 11 (S.D.N.Y. 1981); and draft documents prepared for consideration by the FTC, United States v. J.B. Williams Company, Inc., 402 F. Supp. 796 (S.D.N.Y. 1975).

Although the DBED's comments and suggestions were sent to CH2M Hill, an entity outside of government, these records are just as much an integral part of the DBED's deliberative process in the preparation of the master plan as are comments provided to the DBED's own employees about their drafts. See Brush Wellman, Inc. v. Dep't of Labor, 500 F. Supp. 519 (1980). In Brush Wellman, Inc., the court upheld the federal Department of Labor's denial of access to drafts of studies prepared by a private consultant and to agency employees' comments concerning the consultant's drafts. The court agreed with the agency's assertion:

> [R]elease of the withheld records would reveal the input and mental processes of OSHA staff who worked with or reviewed the drafts produced by BBN. Certainly release of comments prepared by Department of Labor staff on the drafts would have this result.

500 F. Supp. 519, 523 (N.D. Ohio 1980).

In light of the court's holding in Brush Wellman, Inc., we believe that the disclosure of the DBED's comments and suggestions to CH2M Hill would expose agency decision-making during the drafting and revising of the master plan and, thus, discourage the DBED's candor and openness in its comments to CH2M Hill. Consequently, in order to prevent the frustration of the DBED's deliberative functions in the master plan's preparation, the DBED's comments and suggestions to CH2M Hill are not required to be open to public inspection under section 92F-13(3), Hawaii Revised Statutes.

b. Correspondence Concerning the Negotiation of Contract Terms

The correspondence between the DBED and CH2M Hill included letters and other transmittals exchanged with regard to the negotiation of certain contract terms, such as the scope of work, deadlines, and expenses. In our opinion, this category of correspondence is outside the DBED's decision-making involved in the master plan's preparation. Rather, this correspondence reveals negotiations between the two parties to the consultant contract. Because this correspondence is not the type of information that the DBED "requested . . . to aid its own policy deliberations," such records do not fall under the exception to disclosure in section 92F-13(3), Hawaii Revised Statutes, on the basis of the "deliberative process privilege." County of Madison, New York v. United States Dep't of Justice, 641 F.2d 1036 (1st Cir. 1981) (letters between the agency and claimant discussing the claims asserted and a proposed settlement, which the claimant refused, did not fall under FOIA exemption (b)(5) and, thus, were required to be disclosed during the appeal of the subsequent court decision). However, we need to examine whether the "frustration of a legitimate government function" exception may apply to this correspondence in other respects.

As we have noted in prior opinions, the exception based upon the frustration of a legitimate government function cannot be invoked whenever the disclosure of records may be "frustrating" to a government agency. See OIP Op. Ltr. No. 90-2 (Jan. 18, 1990). Rather, the State Legislature had definite ideas regarding instances which would rise to the level of "frustration of a legitimate government function." Specifically, in Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature provided "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function." These examples provide valuable guidance regarding the scope of this exception. We find that the following two examples are relevant to the DBED and CH2M Hill's correspondence concerning their negotiation of contract terms:

> (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;
>
> (7) Trade secrets or confidential commercial and financial information;

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

With regard to the first category of records listed, we previously opined that an agency's public disclosure of certain records may give a "manifestly unfair advantage" to a party involved in ongoing negotiations with an agency relating to a contract or settlement. See OIP Op. Ltr. No. 89-15 (Nov. 20, 1989) (Aloha Tower proposals); OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (evaluation of proposals); OIP Op. Ltr. No. 89-10 (Dec. 12, 1989) (settlement agreements). However, the correspondence concerning contract terms between the DBED and CH2M Hill relate to negotiations that have been completed and that resulted in amendments to the original consultant contract. We find that because the contract negotiations are no longer ongoing, the disclosure of such correspondence at this time gives no

"manifestly unfair advantage" to either CH2M Hill or MCM Planning in their consultant contracts with the DBED.

The correspondence from CH2M Hill concerning negotiation of contract terms may arguably constitute commercial or financial information. See Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983) (records are commercial so long as the submitter has a "commercial interest" in them). In order to fall within the "frustration of a legitimate government function" exception, such commercial and financial information must also be "confidential." In previous opinion letters, we set forth the following criteria for determining whether a record constitutes "confidential commercial or financial information," based upon decisions of the federal courts interpreting exemption (b)(4) of the federal Freedom of Information Act:

> [Commercial or financial matter is "confidential" for purposes of this exemption if disclosure is likely to
>
> have either of the following effects: (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.

OIP Op. Ltr. No. 90-21 at 11 (June 20, 1990); OIP Op. Ltr. No. 89-5 (Nov. 20, 1989); OIP Op. Ltr. No. 90-3 (Jan. 18, 1990), quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) ("National Parks I").

Applying the National Parks I test discussed in these OIP opinions, we do not believe that the correspondence between the DBED and CH2M Hill concerning the negotiation of contract terms constitutes "confidential business and commercial information" under either prong of this test. First, the disclosure of the correspondence concerning contract terms will not likely "impair the government's ability" to enter into contracts with consultants and receive correspondence from its consultants concerning the negotiation of contract terms. In our opinion, the disclosure of this correspondence will have no chilling effect in the future on other private consultants who must

negotiate with the respective agencies about their contract terms. See Racal-Milgo Gov't Sys. v. Small Business Admin., 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"); see generally United States Dep't. of Justice, Office of Information and Privacy, Freedom of Information Case List 427 (1990 ed.) ("FOIA Case List").

We also find that the disclosure of correspondence concerning the negotiation of contract terms would not likely cause "substantial competitive harm" to CH2M Hill. See, e.g., OIP Op. Ltr. No. 89-5 at 16 (Nov. 20, 1989) (examples of information the disclosure of which have been recognized by federal courts as "generally causing competitive harm). The disclosure of these records reveals nothing about CH2M Hill's operations other than its negotiations with the DBED about obligations and payments under the consultant contract. Cf. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672 (D.C. Cir. 1976) ("exhaustive cataloging of operating data which provides a complete picture of a concessioner's operating condition" is exempt from disclosure).

The correspondence exchanged between the DBED and CH2M Hill in their negotiations may reveal disagreements that may have arisen about contract terms. However, we previously concluded that unfavorable publicity, or embarrassment, as a result of a record's disclosure does not constitute "substantial competitive harm" under the National Parks I test. See OIP Op. Ltr. No. 90-21 at 13 (June 20, 1990) (financial and compliance audit of state-funded agency); see also Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 n. 30 (D.C. Cir. 1983) (correspondence regarding complications and adverse reactions resulting from the use of a medical device is not protected).

As a result of the foregoing analysis, we find that the disclosure of the DBED and CH2M's correspondence concerning the negotiation of contract terms would not constitute "[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. 1990). In the absence of an applicable exception, the UIPA requires

that these records be made available for public inspection and copying.

II. Government Records Expressly Made Public

Section 92F-12(a), Hawaii Revised Statutes, sets forth categories of records that must be made available for public inspection and duplication "[a]ny provision to the contrary notwithstanding," including "[g]overnment purchasing information including all bid results except to the extent prohibited by section 92F-13." Haw. Rev. Stat. Þ 92F-12(a)(3) (Supp. 1990). The correspondence between the DBED and CH2M Hill concerning their negotiation of contract terms may arguably constitute "government purchasing information" since these records relate to the DBED's "purchase" of CH2M Hill's consulting services. Such "government purchasing information" is subject to public inspection so long as disclosure is not "prohibited by section 92F-13," Hawaii Revised Statutes. Id. As discussed, we find that under the facts presented the correspondence concerning the contract terms is not protected by a UIPA exception. Hence, the disclosure of these records is

Another category under section 92F-12(a), Hawaii Revised Statutes, expressly makes public certain information "[r]egarding contract hires and consultants employed by agencies," specifically "the contract itself, the amount of compensation, the duration of the contract, and the objectives

of the contract." Haw. Rev. Stat. Þ 92F-12(a)(10) (Supp. 1990) (emphasis added). Accordingly, the DBED must publicly disclose its original consultant contract with CH2M Hill, the amendments to the contract, and the contract with MCM Planning for the preparation of the EIS.

CONCLUSION

In order to avoid the frustration of agency decision-making during the preparation of the master plan, the draft of the master plan is not required to be disclosed under the UIPA exception for "[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. Þ 92F-13(3) (Supp. 1990). For the same reason, correspondence consisting of the drafts submitted by CH2M Hill for the

draft master plan and the DBED's comments and suggestions about these drafts are also not subject to public access. However, the "frustration of a legitimate government function'" exception does not apply to the DBED and CH2M Hill's correspondence concerning their negotiation of contract terms. Therefore, because we find that these records are not protected by a UIPA exception, they must be made available for public inspection and copying.

Lorna J. Loo
Staff Attorney

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APPROVED:

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