June 29, 1992

The Honorable Keith W. Ahue
Director
Department of Labor and Industrial Relations
830 Punchbowl Street
P. O. Box 3769
Honolulu, Hawaii 96812-3769

Attention: Mr. Orlando K. Watanabe
Disability Compensation Division Administrator

Dear Mr. Ahue:

Re:List of Employers that are Self-Insured for Workers' Compensation Purposes

This is in reply to your letter to the Office of Information Practices ("OIP") dated March 4, 1992, requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Labor and Industrial Relations ("DLIR") must make available, for public inspection and copying, a list of the names of the employers that have obtained approval from the DLIR to be self-insured for purposes of Hawaii's Workers' Compensation Law, chapter 386, Hawaii Revised Statutes.

BRIEF ANSWER

The UIPA provides that all government records must be made available for public inspection and copying, unless one of the statutory exceptions to public access set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to those records. See Haw. Rev. Stat. □92F-11(b) (Supp. 1991).

Under the UIPA, agencies are not required to disclose "[g] overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. □92F-13(1) (Supp. 1991). The UIPA's personal privacy exception applies only to information in which a "natural person" has a significant privacy interest. See Haw. Rev. Stat. □□92F-14 (a), 92F-3 (Supp. 1991) . Because none of the self-insured employers at issue are natural persons, in our opinion the UIPA's personal privacy exception does not protect information about these self-insured employers, including the fact of their self-insured status, from disclosure.

Under another of the UIPA's statutory exceptions, agencies are not required to disclose "[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. 1991). The legislative history of this exception indicates that it applies to "confidential commercial and financial information." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In determining whether the names of employers that are self-insured under Hawaii's Workers' Compensation Law constitute "confidential commercial and financial information," in accordance with previous OIP opinion letters, we examine federal court decisions applying Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. □552(b) (4) (1988) ("FOIA") for guidance. Based on a review and application of those sources, we conclude that a list of self-insured employers is not "confidential" commercial or financial information that must remain confidential in order to avoid the frustration of a legitimate government function.

Further, based on our examination of a sample employer-prepared confidentiality agreement that was provided for the OIP's review, we conclude that it does not prohibit the DLIR from disclosing information concerning an employer's self-insured status. Therefore, we need not express an opinion about the validity of that sample confidentiality agreement under the UIPA.

Lastly, the UIPA does not require an agency to prepare a compilation or summary of its records, unless the information is "readily retrievable." See Haw. Rev. Stat. □92F-11(c) (Supp. 1991) . This UIPA provision clarifies that under the UIPA, an

agency's duty is generally limited to providing access to existing records; an agency does not have to create "new" records for the convenience of a requester. In this case, we conclude that although the DLIR's existing programming capabilities do not permit it to readily produce a list containing only the self-insured employers' names, the DLIR maintains existing records responsive to the request. Specifically, the DLIR maintains an "assessment list" of self-insured employers that the DLIR can provide to the public after it segregates from the list all information except the employers' names.

FACTS

By a letter dated January 23, 1992, Mr. Kevin Shea requested the DLIR to provide him with a list of the names of the employers that are self-insured for purposes of chapter 386, Hawaii Revised Statutes, entitled "Workers' Compensation Law." In a letter dated February 5, 1992, the DLIR's Disability Compensation Division ("DCD") informed Mr. Shea, among other things, that the requested information was "not available," or alternatively, was not "public information." By letter to the OIP dated February 12, 1992, Mr. Shea requested the OIP to provide him with an advisory opinion concerning the DCD's denial of his information request.

Under chapter 386, Hawaii Revised Statutes, non-public employers in the State of Hawaii must secure the payment of workers' compensation to their employees, in one of the following ways: (1) obtain and maintain workers' compensation insurance (or become a member in a workers' compensation self-insurance group or in a workers' compensation group insured by a captive insurer); (2) deposit and maintain security satisfactory to the director of the DLIR (the "Director"); or (3) apply for and obtain approval from the Director to be self-insured. See Haw. Rev. Stat. §386-121 (Supp. 1991) . In this opinion, we examine the question of public access to information concerning an employer's self-insurance option, number (3) above, which is described by section 386-121 (a) (3), Hawaii Revised Statutes, as follows:

> **§386-121 Security for payment of compensation; misdemeanor.** (a) Employers, except the State, any county or political subdivision of the State, or other public entity within the State, shall secure compensation to their employees in one of the following ways:

> . . . .
>
> (3) Upon furnishing satisfactory proof to the director of the employer's solvency and financial ability to pay the compensation and benefits herein provided, no insurance or security shall be required, and the employer shall make payments directly to the employer's employees, as they may become entitled to receive the same under the terms and conditions of this chapter; . . . .

Haw. Rev. Stat. □386-121(a) (3) (Supp. 1991) (emphasis added).

Under section 386-121 (a) (3), Hawaii Revised Statutes, the Director makes case-by-case determinations concerning whether a particular employer qualifies to be a self-insured employer, based upon the Director's review of the financial and other data submitted by the employer.

In its letter to the OIP dated March 4, 1992, the DCD stated that the list of self-insured employers is not public information because: (1) some employers have requested confidentiality, and (2) the list of self-insured employers is not readily available. With respect to the latter, the DCD has informed the OIP that it does maintain an "assessment list" of self-insured employers, which contains the names of those employers, along with other information such as the employers' past workers' compensation payments and average annual compensation. We understand that this comprehensive assessment list is contained in an electronic database and that the DLIR can produce a print-out of this list.

Further, the OIP is informed that none of the self-insured employers are individuals that conduct their businesses as sole proprietorships, and that the DLIR's past practice has been to disclose information concerning a particular employer's workers' compensation insurance status upon request. This information has been provided from the DLIR's database in response to past telephone inquiries and includes the fact that the employer is self-insured, as well as the name of the employer's adjustor, if any.

In connection with the preparation of this opinion letter, the DCD provided the OIP with a sample employer-prepared confidentiality agreement for its review. The confidentiality agreement provides:

> [DCD] understands that certain materials and information relative to [the employer] will be given to [DCD] in order to evaluate [the employer]. [DCD] understand[s] that this material and information is to be kept confidential. Only those people involved with [the employer] will have access to the material and information, and they agree that nothing contained therein will be divulged to any other party or organization, nor will any copies be made of the material, unless by written approval of [the employer].

DISCUSSION

I. INTRODUCTION

The UIPA generally 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. 1991). Unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, they must be made available for inspection and copying. See Haw. Rev. Stat. □92F-11(b) (Supp. 1991).

We shall now examine whether information concerning the identities of self-insured employers is protected from disclosure by one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes.

II. DISCLOSURE OF LIST OF THE NAMES OF SELF-INSURED EMPLOYERS

A. Clearly Unwarranted Invasion of Personal Privacy

The exceptions to the UIPA's general rule that all government records are public are found in section 92F-13, Hawaii Revised Statutes. Under the first of these exceptions, agencies are not required to disclose "[g] overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. □92F-13(1) (Supp. 1991).

The UIPA's personal privacy exception applies only to information in which an "individual" has a significant privacy interest. See Haw. Rev. Stat. □92F-14(a) (Supp. 1991). The

UIPA defines the term "individual" to mean "a natural person." Haw. Rev. Stat. □92F-3 (Supp. 1991) . Thus, in several OIP opinion letters, the OIP concluded that under the UIPA, corporations, partnerships, and other business entities do not have a cognizable personal privacy interest in information maintained by government agencies. See OIP Op. Ltr. Nos. 89-1 (Sept. 11, 1989); 89-5 (Nov. 20, 1989); 89-13 (Dec. 12, 1989); 91-21 (Nov. 21, 1991) ; 91-27 (Dec. 13, 1991).

The DLIR has informed the OIP that none of the self-insured employers under chapter 386, Hawaii Revised Statutes, are "natural persons." Consequently, it is our opinion that the UIPA's personal privacy exception does not apply to information concerning an employer's self-insured status under Hawaii's Workers' Compensation Law. Moreover, even assuming that a self-insured employer were a "natural person" and assuming that an individual's privacy interest in the fact of self-insurance were significant, we believe that the public interest in the disclosure of information concerning whether employers have complied with Hawaii's Workers' Compensation Law, either by obtaining insurance or being approved for self-insurance, would outweigh the individual's privacy interest in that information. See Haw. Rev. Stat. □92F-14(a) (Supp. 1991); OIP Op. Ltr. No. 89-1 at 5 (Sept. 11, 1989) ("the public interest in disclosure of the types of information required by the DLIR as proof of compliance with Hawaii's workers' compensation law would easily outweigh the individual's privacy interest in information such as the insurance carrier, coverage, or policy number").

We now turn to an examination of whether information concerning an employer's self-insured status is protected by other UIPA exceptions to required agency disclosure.

B. Frustration of Legitimate Government Function

Under the UIPA, an agency is not required to disclose "[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. 1991). The UIPA's legislative history provides examples of government records which need not be disclosed, if disclosure would frustrate a legitimate government function, including "[t] rade secrets or confidential commercial and financial information." S. Stand. Comm. Rep. No. 2580, 14th

Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added).[1]

Assuming that the information in question is "commercial and financial information," to be protected from disclosure the information must meet the additional requirement of being "confidential." In determining whether commercial and financial information is "confidential," the OIP has previously examined and applied court decisions applying Exemption 4 of the FOIA. See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 90-3 (Jan. 18, 1990) ; 90-21 at 11 (June 20, 1990) ; 91-21 (Nov. 21, 1991) . We have done so because the FOIA's Exemption 4 protects from required agency disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. □552(b) (4) (1988) (emphasis added).

Case law under Exemption 4 of the FOIA has established the following test to determine whether commercial and financial information is "confidential":

> [C] ommercial 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. 90-3 at 9 (Jan. 18, 1990) (quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)).

1.Impairment of Government's Ability to Obtain Necessary Information

To successfully invoke the "impairment prong" of the FOIA's Exemption 4, the agency must usually be able to

[1]In our opinion, a list of the names of self-insured employers does not rise to the level of a "trade secret." See OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (definition of trade secret discussed).

demonstrate that the information was provided voluntarily and that the submitting entity would not have provided it if it had believed that the material would be subject to disclosure. Protection under the "impairment prong" of Exemption 4 has been denied where participation in a program (i.e., bidding on a government contract) is technically voluntary, yet submission of the information is actually mandatory if the submitter wishes to enjoy the benefits of participation. See OIP Op. Ltr. No. 91-16 at 11 (Sept. 19, 1991) and cases cited therein.

It is highly questionable whether the names or identities of self-insured employers would constitute information "obtained" by an agency within the meaning of Exemption 4. However, assuming that it is, in our opinion, public disclosure of information concerning an employer's self-insured status will not significantly impair the DLIR's ability to obtain financial and other data from employers in the future. Although an employer's choice of self-insurance as the method with which it will comply with Hawaii's Workers' Compensation Law is "voluntary," submission of satisfactory proof of the employer's solvency and financial ability is mandatory if the employer wishes to be approved for self-insurance. Therefore, like the above example involving government contract bids, the "impairment prong" of Exemption 4 will not protect information concerning an employer's self-insured status from disclosure.

We now turn to a consideration of whether the disclosure of information concerning the self-insured status of employers could likely result in substantial competitive harm to those employers.

2. Substantial Competitive Harm

Exemption 4 of the FOIA has been held not to apply when the requested information is extremely general in nature. See, e.g., SMS Data Products Group v. Department of the Air Force, No. 88-0481-LFO, 1989 WL 201031, at *4 (D.D.C. May 11, 1989). In our opinion, disclosure of the fact that certain Hawaii employers are self-insured for workers' compensation purposes would reveal only mundane information about those employers, which at most suggests the employers have met some minimal level of financial solvency. It is not the type of detailed information commonly found to be protected under Exemption 4 by federal courts, such as: detailed financial information about a company's assets, liabilities, and net worth; and actual costs, break-even calculations, profits, and profit margins. See,

e.g., National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

In OIP Opinion Letter No. 89-1 at 6 (Sept. 11, 1989), we opined that DLIR records that contained "information necessary to ascertain that a submitting employer does indeed have workers' compensation insurance," was not the type of information that would "rise to the level of `confidential commercial and financial information.'" Similarly, it is our opinion that a list of self-insured employers, which merely discloses the fact of an employer's self-insurance, would not constitute "confidential commercial and financial information."

Additionally, we note that in response to requests by members of the public about the workers' compensation insurance status of a specific employer, the DCD's past practice has been to disclose, over the telephone, either the name of the insurer or the fact that the employer is self-insured, as applicable.

C. Employer Confidentiality Agreements

An employer who seeks self-insured status must provide the DLIR with detailed information about its operations and financial solvency, so that the Director of the DLIR can evaluate the employer's ability to pay workers' compensation claims and benefits.[2] See Haw. Rev. Stat. □ 386-121(a) (3) (Supp. 1991) . We are informed by the DLIR that some employers request the DLIR to execute a confidentiality agreement, the purpose of which is to prohibit the DLIR from disclosing the financial information and other data submitted to the DLIR by the employer.

The sample confidentiality agreement provided to the OIP for its review seeks to protect only those "materials and information" that "will be given" to the DLIR for purposes of evaluating the employer. It does not expressly prohibit the disclosure of the result of that evaluation, that is the Director's determination that the employer is or is not qualified to be self-insured.

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[2]The issue of whether agencies may disclose the financial information and other data that employers submit with their applications for self-insurance is outside the scope of this opinion.

Additionally, in previous opinion letters, the OIP opined that an agency generally may not, through promises or by contract, avoid the required disclosure provisions of the UIPA. See OIP Op. Ltr. Nos. 90-2 (Jan. 18, 1990); 90-39 at 10 (Dec. 31, 1990) ; 91-29 at 7 (Dec. 23, 1991) . However, having concluded that the sample confidentiality agreement does not prohibit the DLIR's disclosure of information concerning an employer's self-insured status, we need not determine whether the sample agreement would conflict with the DLIR's disclosure obligations under the UIPA.

III. CREATION OR COMPILATION OF A GOVERNMENT RECORD

Having concluded that the names of self-insured employers are not protected from disclosure by the UIPA's exceptions, we now must address whether access to that information is limited because of the form in which it is kept. Section 92F-11(c), Hawaii Revised Statutes, provides:

> **□92F-11 Affirmative agency disclosure responsibilities.**
>
> . . . .
>
> (c) Unless the information is readily retrievable by the agency in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records.

Haw. Rev. Stat. □92F-11(c) (Supp. 1991).

In OIP Opinion Letter No. 90-35 at 9 (Dec. 17, 1990), we noted that the above provision is identical to section 2-102(b) of the Uniform Information Practices Code ("Model Code"), the code upon which the UIPA was modeled by the Legislature. The commentary[3] to this Model Code provision provides useful guidance concerning its application:

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[3]The legislature directed those interpreting the UIPA to consult the Model Code's commentary to guide the interpretation of similar provisions of the UIPA. See H.R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988) . See also, section 1-24, Hawaii Revised Statutes, concerning the interpretation of "uniform acts."

> Subsection (b) specifies that an agency is not under a duty to compile or summarize information in its records unless readily available to the agency in the form requested. In brief, it makes plain that the agency's duty is to provide access to existing records; the agency is not obligated to create "new" records for the convenience of the requester.
> [citations omitted] To illustrate: a request is made for the age, sex, race and evidence of alcohol consumption of all individuals involved in traffic accidents within the past five years. Information pertaining to all accident reports is maintained in the files of a particular agency. The policy question is whether the agency must expend the time, money and effort to locate and supply the requested information. . . . Thus, under subsection (b) the agency may deny the request to compile if such a compilation does not already exist.
>
> As a general rule, subsection (b) should be invoked selectively because the requester has the option of having the full record system duplicated. Disabled Officers' Association v. Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977) . . . .
>
> The policy of subsection (b) is most important to agencies with manual record systems. In computerized record systems, however, agency retrieval capabilities are significantly greater.
> The request in the earlier example would have to be granted if the data could be routinely compiled, given the existing programming capabilities of the agency.

Model Code □2-102 commentary at 11-12 (1980) (emphasis added).

As the above Model Code commentary points out, an agency is not required to create "new" records in response to a UIPA request, unless the data can be "routinely compiled" given an agency's existing programming capabilities. The DLIR has indicated that its existing programming capabilities do not permit it to readily produce a list containing only the names of the self-insured employers. We need not, however, determine whether the DLIR must re-program or re-format its computer database to create a "new" record that contains only the names of the self-insured employers, because we are informed that the DLIR database contains existing records responsive to Mr. Shea's

request. Specifically, the DLIR maintains an assessment list that includes the names of the employers who are self-insured for workers' compensation purposes. Therefore, we recommend that the DLIR provide to Mr. Shea a copy of the assessment list, after segregating or deleting the information Mr. Shea did not request.

CONCLUSION

For the reasons stated above, we conclude that under the UIPA, the names of the employers that have obtained approval to be self-insured pursuant to Hawaii Workers' Compensation Law must be made available by the DLIR for public inspection and copying.

Very truly yours,

Mimi K. Horiuchi
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

MKH: s c
c: Mr. Kevin P. Shea
Wayne Matsuura, Deputy Attorney General