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July 17, 1992

Stanley D. Suyat, Esquire
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Case Mukai & Ichiki
P. O. Box 656
Honolulu, Hawaii 96809

Dear Mr. Suyat:

Re: Demurrage Fee Report Forms and Invoices

This is in response to your letter dated June 29, 1992, to the Office of Information Practices ("OIP") 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"), demurrage fee report forms and invoices maintained by the Department of Transportation, Harbor's Division ("DOT"), must be made available for public inspection and copying upon request.

BRIEF ANSWER

Yes. Based upon our review of: (1) sample demurrage fee report forms that are submitted to the DOT by shipping companies that store containers on the State's commercial docks, and (2) a sample invoice form which the DOT subsequently sends to the shipping companies that owe demurrage fees, the OIP believes that the information contained in these government records is not protected from public disclosure under the UIPA.

These forms contain information about the shipping containers stored by shipping companies on DOT docks, such as the length of time they are left on the docks, the size of the containers, the code for the vessel from which the containers were unloaded, and the amount of demurrage fees incurred. In our

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opinion, this information does not constitute "confidential commercial or financial information" within the meaning of the UIPA's exception for records which, must remain confidential in order "to avoid the frustration of a legitimate government function." See Haw. Rev. Stat. § 92F-13(3) (Supp. 1991).

Further, we cannot discern any other UIPA exception to required agency disclosure which would permit the DOT to withhold public access to the demurrage fee report forms and the invoices. Consequently, we believe that under the UIPA, these records must be made available for public inspection and copying upon request.

FACTS

Shipping companies are permitted by the DOT to store their shipping containers on the State's commercial docks in return for the payment of a tariff or fee. However, the DOT does not directly monitor each shipping company's storage of shipping containers on State commercial dock space. The amount of shipping container storage fees ("demurrage" fees) owed to the DOT is computed by each shipping company, based upon the shipping company's preparation of DOT forms which consist of daily reports, weekly reports (which summarize the daily reports), and monthly reports. These government forms are created by the DOT, but are completed and then submitted to the DOT by the individual shipping companies. Based upon the information contained in the report forms submitted to it by each shipping company, the DOT prepares an invoice form that bills the shipping company for the total demurrage fees owed by that company for the month. Upon receipt of the invoice forms from the DOT, the shipping companies must remit the appropriate payment to the DOT.

The daily demurrage fee reports contain a column indicating the vessel from which each shipping container was unloaded, the date that the containers were unloaded onto the docks, the quantity and size of the containers, and the total demurrage fee incurred for that date by the shipping company. The weekly demurrage fee reports summarize the fees totaled from the daily reports. The monthly demurrage fee reports contain information such as: the size of the containers stored on the commercial docks, the pier number, the beginning and ending dates of storage, the number of containers stored, the rate charged, and the total demurrage fees due for the month. In computing the amount of demurrage fees owed to the DOT, shipping companies follow a fee (or tariff) chart established by the DOT.

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Your client was invited by DOT to submit before July 9, 1992, your client's comments, if any, concerning the DOT's proposed amendments to its administrative rules which set forth the applicable demurrage fees charged by the DOT. Your client requested the DOT to provide it with copies of demurrage fee records filed by other shipping companies with the DOT. The DOT initially denied your client's request for access to these records on the basis that disclosure would reveal the "confidential business information" of the other shipping companies. Subsequently, you requested the OIP to issue an advisory opinion concerning whether the demurrage fee records maintained by the DOT must be made available for public inspection and copying under the UIPA.

DISCUSSION

Under the UIPA, "[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). Section 92F-11(b), Hawaii Revised Statutes, further provides that "[e]xcept 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." We now turn to examine the UIPA exceptions contained in section 92F-13, Hawaii Revised Statutes, to determine whether any of these exceptions apply to protect from disclosure the demurrage fee report forms provided by shipping companies to the DOT and the invoices prepared by the DOT.

Based upon a review of the sample demurrage fee records provided to the OIP by your law firm, the only possibly applicable UIPA exception is section 92F-13(3), Hawaii Revised Statutes, which provides that 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." The legislative history of the UIPA gives several examples of records protected under this UIPA exception, including:

(b) Frustration of a legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

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(7) Trade 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 in original).

We have examined the UIPA's protection of confidential commercial and financial information in several advisory opinions. In OIP Opinion Letter No. 90-3 (Jan. 18, 1990), this office determined that the DOT's Airport Revenue Audit Reports ("Reports") must be publicly accessible under the UIPA. Although the Reports contained "information relating to the lease rent or permit fees paid [by airport concessioners], gross revenues reported or under-reported, and percentage fee due the DOT," we concluded that this information was not "confidential commercial or financial data" protectible under the UIPA's "frustration of a legitimate government function" exception. OIP Op. Ltr. No. 90-3 at 9-10. We reached this conclusion because this information does not reveal the type of confidential commercial or financial information which this UIPA exception was designed to protect. Specifically, the Reports do not reveal the assets, liabilities, and net worth of the concessioners, or other detailed commercial information. See generally OIP Op. Ltr. No. 91-29 (Dec. 23, 1991) (detailed information regarding company's income, expenses, and projected rate of return found protectible) and OIP Op. Ltr. No. 92-7 (June 24, 1992) (general business information not protectible).

Similar to the information found in the Airport Revenue Audit Reports, the information contained in the demurrage fee records merely contain information concerning the shipping containers stored by shipping companies on the State's commercial docks and the fees owed to the DOT for the storage of the same on State property. Further, although government records that reveal the names of a company's customers may possibly be protected as confidential commercial information by the UIPA exception for "frustration of a legitimate government function," based upon our review of the records you provided to our office, we do not believe that the identities of shipping company customers would be revealed by the disclosure of these records.¹

¹However, should the demurrage fee records contain any information which would reveal the identities of a company's customers, this information might be protectible under section 92F-13(3), Hawaii Revised Statutes.

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In our opinion, the disclosure of the demurrage fee records would not reveal confidential financial or commercial information of the shipping companies such as their assets, liabilities, net worth, or the identities of their customers and, thus, we believe that section 92F-13(3), Hawaii Revised Statutes, does not permit the DOT to withhold public access to these records.

In addition, we believe that disclosure of the demurrage fee records would promote governmental accountability, one of the UIPA's core purposes, by revealing whether demurrage fees have been uniformly paid by all shipping companies that store containers on the State's commercial docks. The disclosure of demurrage fee records would reveal the amount of revenues received by the State for the use of State-owned dock space. In previous OIP advisory opinions, this office has found that information concerning monies owed to the State is generally "public" under the UIPA. See OIP Op. Ltr. No. 90-29 (Oct. 5, 1990) (Board of Water Supply account balance information must be publicly accessible); OIP Op. Ltr. No. 90-30 (Oct. 23, 1990) (amounts owed by library patrons for library fines are open for public inspection); and OIP Op. Ltr. No. 91-19 (Oct. 18, 1991) (principal loan balances, charges, and aged account balances owed by Department of Hawaiian Home Lands lessees are public under the UIPA).

Moreover, because the method in which the State administers the demurrage fee collections is basically a "self-regulating" system, withholding access to the demurrage fee records deprives the public of any method of discovering whether the State is diligently collecting the demurrage fees from each shipping company, and of confirming whether there is any favoritism in the collection of the demurrage fees. See also OIP Op. Ltr. No. 90-30 at 12 (Oct. 23, 1990).

Finally, we believe that the right of shipping companies to unload and store their containers on the docks in return for the payment of a demurrage fee is essentially the grant of a permissive license to use dock space owned by the State. The Legislature itself has recognized that government records concerning the use of State property should generally be made public under the UIPA due to the significant public interest in the same. See Haw. Rev. Stat. § 92F-12(a)(5) (Supp. 1991) (each agency shall disclose land ownership records and leases of State land).

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CONCLUSION

The sample demurrage fee report forms and invoice forms provided for the OIP's review and which are used by the DOT to collect demurrage fees from shipping companies do not, in our opinion, contain any information which is protected by any of the UIPA's exceptions to disclosure. Therefore, we believe that, under the UIPA, the demurrage fee reports filed by shipping companies with the DOT, as well as the invoice forms remitted by the DOT to the shipping companies, must be made available for public inspection and copying upon request.

Very truly yours,



Stella M. Lee
Staff Attorney

APPROVED:



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c: David Higa, Harbors Administrator
Department of Transportation