August 12, 1992

The Honorable E. James Turse
Director of Housing & Community Development City
and County of Honolulu
650 S. King Street, 5th Floor
Honolulu, Hawaii 96813

Attention: Mr. Y. Shimabukuro, Chief
Property Management Branch

Dear Mr. Turse:

Re:Applicant Waiting Lists for Section 8 Program
Rent-Subsidized Housing

This is in response to a letter from Mr. Y. Shimabukuro, Chief, Property Management Branch, to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the public's right to inspect and copy the waiting list of applicants for housing at the Smith-Beretania Apartments, a rent-subsidized housing project.

## ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the waiting list of applicants ("waiting list") for the Smith-Beretania Apartments ("Apartments") is a "government record."

II. Whether, under the UIPA, the waiting list of applicants for the Apartments must be made available for public inspection and copying upon request.

## BRIEF ANSWERS

I. Yes. The UIPA governs access to information maintained

by agencies of State and county government. By providing rent-subsidized housing under the Section 8 Program, the owner of the Smith-Beretania Apartments ("Owner") is performing a function ordinarily performed by the City. The contract between HUD and the City as well as the contract between the City and the Owner give the City the right to inspect the Owner's records to monitor the Owner's performance of Section 8 Program requirements. In our opinion, this right to inspect the Section 8 Program records indicates that the City retains "administrative control" over and, thus, "maintains" the waiting list. Consequently, under the UIPA, the waiting list is a "government record" maintained by the City.

II. The UIPA generally provides that all government records shall be made available for public inspection and copying unless protected by one of the UIPA's exceptions to disclosure contained in section 92F-13, Hawaii Revised Statutes.
In applying the exceptions contained in section 92F-13, Hawaii Revised Statutes, we believe that some of the information on the waiting list is protected by section 92F-13(1), Hawaii Revised Statutes. Specifically, we conclude that the UIPA's personal privacy exception protects from disclosure personal information on the waiting list about applicants such as their mailing addresses and their home telephone numbers. We believe that the disclosure of this information would constitute a clearly unwarranted invasion of the applicants' privacy and should be deleted from the waiting list before allowing the public to inspect or copy the same.

However, it is our opinion that information regarding the names and numerical ranks of the applicants, and the column indicating whether the applicants have been screened for financial eligibility, are not protected from disclosure by any of the UIPA's exceptions to required public disclosure. Accordingly, this information should be made available for public inspection and copying after the City has deleted the applicants' mailing addresses and home telephone numbers.

## FACTS

As part of its efforts to provide rent-subsidized housing for financially eligible families requiring government assistance, the City participates in a federal program which enables the City to secure federal funds for this purpose. Specifically, this housing program is authorized by the Section 8 Set-Aside Program of the United States Housing Act of 1937, as amended, 42 U.S.C. □1437f (Supp. 1988), and is commonly

referred to as the "Section 8 Housing Assistance Payments Program."

The Section 8 Program, which is administered on the federal level by the United States Department of Housing and Urban Development ("HUD"), is actually implemented locally in several different ways. For example, in the Section 8 "Existing Housing" Program, the City, as a public housing agency, offers housing certificates and vouchers to eligible families. These eligible families are responsible for finding and renting housing units that meet the standards of the Section 8 "Existing Housing" Program.

In contrast, in the Section 8 "New Construction" Program, HUD deals directly with owners of the apartment buildings, often monitoring the owners' activities in the "New Construction" program without any involvement on the part of the City. However, for certain projects, the HUD does enlist the assistance of the City to monitor the building owners' participation in the program. Because the Smith-Beretania Apartments is part of the Section 8 "New Construction" Program, and the City was requested by HUD to administer the Smith-Beretania Apartments project, we shall focus upon and examine the details of the Section 8 "New Construction" Program. While the Section 8 Program actually consists of several different programs, throughout this opinion, we shall refer to the Section 8 "New Construction" Program as the "Section 8 Program" for the sake of simplicity.

In the Section 8 Program, the private apartment building owners accept applications directly from the applicants, screen the applications, conduct lotteries to establish applicant waiting lists, and verify the information supplied by the applicants. Once eligible families are housed in the apartment units, the City pays rent subsidies to the private owner of the apartment building for each eligible family that is provided housing. Although the source of rent subsidies are through federal funds, the City acts as the agent and contract administrator for HUD, and monitors the housing award process.

Chapter 10, section 6-1003(b) of the Revised Charter of the City and County of Honolulu (1984) states that the director of the City's Department of Housing and Community Development ("DHCD") is authorized to "[ a] ct as the local public officer for the purpose of implementing federally-aided housing" and, thus, the DHCD is responsible for administering the Section 8 Program. However, although the DHCD monitors the owners and disperses the

Section 8 Program rent subsidies from the federal government to the owners, the DHCD does not screen or select applicants and, therefore, does not keep any records on the applicants or the housing award process.

In order to confirm or to adjust the amount of rent subsidies paid to the owners pursuant to the Annual Contributions Contract ("ACC") between HUD and the City, the DHCD is required to periodically reexamine the owners' records concerning applicants' information. Part II, section 2.16 of the Housing Assistance Payments Contract ("HAPC") between the City and the owners states that the owners shall permit HUD and the City "to have access to the premises and, for the purposes of audit and examination, to have access to any books,
documents, papers and records of the owner[s] that are pertinent to compliance with this Contract, including the verification of information pertinent to the housing assistance payments."

The privacy rights of the applicants are protected by section 3.3(f) of the ACC which states that "the [City] shall maintain and require Owners to maintain as confidential all information relating to Section 8 applicants and assisted families, the disclosure of which would constitute an unwarranted invasion of personal privacy." For this reason, in the past, the DHCD as well as the owner of the Smith-Beretania Apartments have kept all matters pertaining to Section 8 applicants confidential.

Last year, because the number of applicants exceeded the available apartment units, the owner of the Smith-Beretania Apartments held a lottery to establish an applicant waiting list. The lottery was conducted on the grounds of the Apartments and the DHCD monitored the process to ensure that proper procedures were followed. Applicants' names were drawn from a pool and were then publicly announced. However, the numerical order in which names were called out ("lottery number") is not necessarily the order in which the housing is awarded ("numerical rank"). This is the case because the Owner is required by federal statute to give preferences to applicants who: (1) are currently in sub-standard housing, (2) are paying more than 50% of their gross income for rent, or (3) were involuntarily moved from their previous housing. See 42 U.S.C. □1437f(d) (1) (A) (Supp. 1988) . Consequently, a person without preferences whose name is called first from the pool may drop in actual numerical rank because of the priority given to other applicants who qualify under one of the preference categories.

If apartment applicants want to know their actual numerical rank on the waiting list, a list of lottery numbers and corresponding numerical rank is available at the Owner's office. The Owner is required by the ACC to keep confidential all information relating to Section 8 housing applicants, the disclosure of which would constitute an unwarranted invasion of privacy. For this reason, the Owner does not include the names of the applicants on the waiting list. However, the Owner does maintain two waiting lists containing the names of applicants: one list contains the names and numerical ranks of applicants with preferences, and the other list reflects the names and numerical ranks of applicants without preferences. Both lists were compiled from the lottery results and contain such information as the applicants' names, mailing addresses, and home telephone numbers. In addition, both waiting lists contain a "yes/no" column indicating whether the application has been screened by the Owner for verification that the applicant is eligible to participate in the Section 8 Program. For purposes of our discussion, reference to the "waiting list" shall mean both waiting lists, applicants with preferences and applicants without preferences, maintained by the Owner which contain applicants' names and numerical ranks.

The DHCD has received a request from a member of the public for a copy of the waiting list of applicants for the Apartments. The DHCD would like to know whether, under the UIPA, it is required to make the waiting list available for public inspection and copying. At our request, Mr. Y. Shimabukuro of the DHCD contacted Mr. Wallace Au of HUD's Housing Management Branch in Hawaii, and was informed by Mr. Au that the Owner would not lose or jeopardize his HUD funding if he makes the waiting list of applicants and their corresponding lottery rank numbers available for public inspection. Accordingly, section 92F-4, Hawaii Revised Statutes, is inapplicable to the facts presented here. See Act 118, 1992 Haw. Sess. Laws ___.[1]

[1]Act 118, 1992 Session Laws of Hawaii , create section of the UIPA that provides that "[w]here compliance with any provision of [ the UIPA] would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance."

## 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). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. □92F-3 (Supp. 1991) . Thus, in order to conclude that the waiting list is a "government record" subject to the provisions of the UIPA, it is necessary to find that the waiting list constitutes "information maintained by an agency." We now turn to an examination of whether the City "maintains" the waiting list.

### II. THE CITY "MAINTAINS" THE WAITING LIST

In OIP Opinion Letter No. 91-5 (April 15, 1991), the OIP noted that the Legislature did not provide an express definition of the term "maintain" as part of the UIPA. Accordingly, we then examined the provisions of the Uniform Information Practices Code ("Model Code"), upon which the Legislature modeled the UIPA.[2] We observed that under section 1-105(6) of the Model Code, the term "maintain" means to "hold, possess, preserve, retain, store or administratively control." After examining the Model Code commentary, we concluded that, under the UIPA, "an agency may [ in some cases] `maintain' a government record without having physical custody of the information, provided that it has administrative control over the same." OIP Op. Ltr. No. 91-5 at 7. Further, the OIP found that the word "control" refers to "the power or authority to manage, direct or oversee," and also relates to "authority over what is not in one's physical possession." OIP Op. Ltr. No. 91-5 at 7, quoting Hardware Mut. Cas. Co. v. Crafton, 350 S.W.2d 506, 507 (Ak. 1961); Bryant v. State, 185 A.2d 190, 193 (Md. 1962).

In applying the above principles to the facts presented, we note that the provisions of the contract between the City

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[2]The UIPA's legislative history directs those interpreting its provisions to consult the Model Code for guidance in interpreting similar provisions of the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988) ; see also Haw. Rev. Stat. □1-24 (Supp. 1991).

and the Owner (as well as the contract between HUD and the City) establish that the City, in order to monitor the Owner's compliance with the requirements of the Section 8 Program, must have access to the Section 8 Program records maintained by the Owner. For example, part II, section 2.6 (a)(2) of the HAPC requires the Owner to submit to the City "statements as to project operation, financial conditions and occupancy as HUD may require pertinent to administration of the Contract and monitoring of project operations."

The HAPC also provides in part II, section 2.8(e) that "[t]he Owner shall process applications for admission, notifications to applicants, and complaints by applicants in accordance with applicable HUD and [City] regulations and requirements and shall maintain records and furnish such copies or other information as may be required by HUD or the [City]." [emphasis added.] Moreover, part II, section 2.16(b) of the HAPC states:

> The Owner shall permit HUD and the [City] or any of their duly authorized representatives to have access to the premises and, for the purpose of audit and examination, to have access to any books, documents, papers and records of the Owner that are pertinent to compliance with this Contract, including the verification of information pertinent to the housing assistance payments.

Finally, part III, section 3.3 (c), of the ACC provides that the City:

> [S]hall make or cause to be made periodic reexaminations of the income, composition, and extent of exceptional medical or other unusual expenses of Families for whom housing assistance payments are being made, for the purpose of confirming or adjusting, in accordance with the applicable schedules and criteria established by HUD, the amount of rent payable by the Family and the amount of housing assistance payment.

We believe that the above contract provisions, taken together, evidence the City's administrative control over Section 8 Program records compiled by the Owner. In addition, we point out that these facts can be distinguished from the situation where a government agency merely audits the records of an outside entity. For example, in contrast to State Department

of Taxation audits of the financial records of private entities, the DHCD inspects the Owner's Section 8 financial records to monitor the Owner's performance because the Owner, by providing rent-subsidized housing, is performing a function ordinarily performed by the DHCD. Consequently, in our opinion, the City, which has delegated to the Section 8 Program Owner its duty to provide rent-subsidized housing,[3] has the requisite administrative control over the Section 8 Program records for us to find that the waiting list is information "maintained" by the City.

We now turn to an examination of whether this information is protected from disclosure under the UIPA.

III. APPLICATION OF THE UIPA EXCEPTIONS

Under the UIPA, the public disclosure of a government record is not required if the record falls within any of the five exceptions set forth in section 92F-13, Hawaii Revised Statutes. Therefore, we must now determine whether any of these exceptions protect the information on the waiting list from required disclosure.

A. Records Protected by State or Federal Law

Under the UIPA, agencies are 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. 1991). Although the ACC between HUD and the City requires the City and the Owner to keep "confidential all information relating to Section 8 applicants and assisted families the disclosure of which would constitute an unwarranted invasion of personal privacy," our research has not revealed any federal statute or regulation that mandates this ACC provision, or that prohibits the disclosure of Owner-held information. Nor did our research reveal any State statute which specifically requires or permits the City to keep all information pertaining to Section 8 Program housing applicants confidential. See generally, OIP Op. Ltr. No. 92-6 (June 22, 1992).

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[3]The Revised Charter of the City and County of Honolulu (1984) provides that the City, through the director of the DHCD, is responsible for administering and implementing federally-aided housing programs. See Revised Charter of the City and County of Honolulu □6-1003(b) (1984).

Accordingly, we believe that section 92F-13(4), Hawaii Revised Statutes, does not apply to protect the waiting list from disclosure to the public.

B. Clearly Unwarranted Invasion of Personal Privacy

Section 92F-13(1), Hawaii Revised Statutes, provides an exception to disclosure for government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. This exception is further clarified by section 92F-14(a), Hawaii Revised Statutes, which states that "[ dl isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." In applying this balancing test, "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

As a preliminary matter, based upon previous OIP opinion letters, we conclude that the home addresses and home telephone numbers contained on the waiting list should not be publicly accessible because disclosure would constitute a "clearly unwarranted invasion of personal privacy." See OIP Op. Ltr. No. 89-13 (Dec. 12, 1989); OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-10 (Feb. 26, 1990); and 90-25 (July 12, 1990). But see OIP Op. Ltr. No. 89-8 (Nov. 20, 1989) (home addresses contained in certified payroll records should not be deleted because entire record is required to be made public under section 92F-12, Hawaii Revised Statutes). Further, the OIP has determined that those mailing addresses which cannot be differentiated from home addresses should also not be publicly disclosed. See OIP Op. Ltr. No. 91-19 (Oct. 18, 1991) . Consequently, the mailing addresses and home telephone numbers on the waiting list for the Apartments should not be disclosed to the public in order to protect the applicants' privacy interests.

Section 92F-14(b), Hawaii Revised Statutes, lists examples of information in which an individual has a significant privacy interest, two of which may be applicable to the facts presented. Specifically, section 92F-14 (b) (3), Hawaii Revised Statutes, states that individuals have a significant privacy interest in "[ ii nformation relating to eligibility for social services or welfare benefits or to the determination of benefit levels." In

addition, section 92F-14(b) (6), Hawaii Revised Statutes, states that individuals have a significant privacy interest in "[ i] nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness."

Although we believe that, ordinarily, an individual has a significant privacy interest in the fact that they appear on a waiting list for rent-subsidized housing, we note that these names were already publicly announced when the names of the applicants were drawn from the pool in the lottery held on the apartment premises. Consequently, we do not believe that the waiting list applicants have a significant privacy interest in the fact that their names appear on this list. Further, we do not believe that the disclosure of each applicant's numerical rank will implicate the applicants' privacy interests. Thus, we conclude that the public interest in the disclosure of the names and numerical ranks of applicants on the waiting list outweighs the applicants' privacy interest in the fact that they have applied for assistance under the Section 8 Program.[4] Accordingly, in our opinion, the disclosure of this information would not constitute a clearly unwarranted invasion of privacy under section 92F-13(1), Hawaii Revised Statutes.

In addition to each applicant's name and numerical rank, the waiting list contains a "yes/no" column which indicates whether the Owner has screened the applicant's background information for verification that the applicant qualifies for assistance under the Section 8 Program. We believe that the information contained in this column constitutes "[ i] nformation relating to eligibility for social services or welfare benefits" under section 92F-14(b) (3), Hawaii Revised Statutes. Further, we also believe that disclosure of the information in this column on the waiting list would reveal "[ i] nformation describing an individual's finances, income, . . . [ or] financial history" under section 92F-14(b) (6), Hawaii Revised Statutes, because it would reveal that the applicant has an income equal to or below the minimum amount required for eligibility in the Section 8 Program. To determine whether

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[4]The legislative history of the UIPA states that "[ i] f the privacy interest is not `significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

disclosure of this information would constitute a "clearly unwarranted invasion of privacy," we now turn to a balancing of the "public interest" in disclosure of this information against the personal privacy interests involved. See Haw. Rev. Stat. □92F-14 (a) (Supp. 1991).

Under the UIPA's balancing test, the "public interest" to be considered is the public interest in the disclosure of information that sheds light on the conduct of government agencies in the performance of their duties, or that otherwise promotes governmental accountability. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) . In our opinion, the disclosure of the "yes/no" column indicating whether the waiting list applicant has been screened for financial eligibility would shed significant light on the Owner's actions in awarding apartment units to applicants eligible for Section 8 Program assistance and would also ensure that the Owner adheres to the waiting list procedures.

Federal case law also substantiates the significant public interest in the disclosure of Section 8 Program waiting lists. In Ressler v. Landrieu, 502 F.Supp. 324 (D. Alaska 1980), an applicant for Section 8 Program assistance filed suit against the Secretary of the Department of Housing and Urban Development alleging that the method of awarding housing to applicants for Section 8 Housing Assistance Program rental units violated the Due Process Clause of the Fifth Amendment. Although not specifically addressing the Freedom of Information Act, 5 U.S.C. □552 (1988), or the Privacy Act, 5 U.S.C. □552a (1988), the Court recommended that a waiting list procedure be instituted and that the waiting list for the Section 8 Program "be made available to the applicants upon request in the office of the project manager." Ressler, 502 F. Supp. at 329. The purpose of disclosing the waiting list was to ensure that private owners participating in the rent-subsidized housing program follow a chronological list rather than arbitrarily award housing among the pool of applicants. Id.

Although the disclosure in Ressler was limited to other applicants on the waiting list, for reasons similar to those noted by the court in Ressler, the OIP concluded, in a previous advisory opinion, that the waiting list for Hawaiian Home Lands applicants and their numerical ranks, should be made available for public inspection. See OIP Op. Ltr. No. 89-4 (Nov. 9, 1989).

In OIP Opinion Letter No. 89-4, the OIP found that the privacy interests of the individuals on the Hawaiian Home Lands

waiting list in not having their names disclosed were significant; however, we also found that such individuals' significant privacy interests were outweighed by the public interest in knowing that the homestead award process was being efficiently and fairly administered. Because the demand for Hawaiian homestead land vastly exceeded the available land and also because there was general public sentiment that the awarding of the homestead land was arbitrary and unfair, the OIP opined that disclosure of the waiting list "will eliminate any possibility of favoritism or manipulation in the award of homestead leases." OIP Op. Ltr. No. 89-4 at 6.

Moreover, in OIP Opinion Letter No. 91-19 (Oct. 18, 1991), the OIP concluded that the disclosure of Hawaiian Home Lands lessees' and their spouses' native Hawaiian quotients would not constitute a clearly unwarranted invasion of personal privacy because disclosure of this information was "the only way to demonstrate to the public that the Hawaiian Homelands program is benefiting the proper individuals." Thus, although the lessees and their spouses had a significant privacy interest in their ethnicity, this significant privacy interest was outweighed by the public interest in disclosure.

Similar to the facts present in the above OIP advisory opinions, the demand for rent-subsidized housing greatly exceeds the available supply. Moreover, there is some concern among the Section 8 Program applicants that the waiting list procedure for rent-subsidized housing programs is not being followed, and that units are being awarded to individuals who are financially ineligible for Section 8 Program assistance.

Consequently, we believe that the public interest in disclosure of information regarding the awarding of apartment units to the proper individuals and in accordance with the waiting list procedure outweighs the privacy interests of the individuals applying for the Section 8 Program. In addition, we conclude that disclosure of the names of applicants and their ranks on the waiting list, as well as the column indicating whether the applicant has been screened for financial eligibility, would further one of the UIPA's policies by "[ o] pening up the government processes to public scrutiny" in order to protect the public's interest. Haw. Rev. Stat. □92F-2 (Supp. 1991) . Accordingly, we conclude that the disclosure of the names and numerical ranks of applicants, as well as the disclosure of the column indicating whether the applicant has

been screened for financial eligibility, would not constitute a clearly unwarranted invasion of personal privacy.

C. Remaining UIPA Exceptions

In our opinion, none of the other exceptions set forth in section 92F-13, Hawaii Revised Statutes, apply to the names and numerical ranks of applicants, or the column indicating whether the applicant's financial background has been screened. Accordingly, we conclude that this information must be made available for public inspection and copying under the UIPA.

## CONCLUSION

We conclude that disclosure of the home addresses and home telephone numbers contained within the Section 8 Program waiting list would constitute a clearly unwarranted invasion of personal privacy. Therefore, under the UIPA, this information should not be made publicly accessible. However, in our opinion, the names of the applicants and their numerical ranks, as well as the "yes/no" column indicating whether the applicants have been screened for financial eligibility for the Section 8 Program, do not qualify for protection under any of the UIPA exceptions. Therefore, we conclude that this information should be made available for public inspection and copying upon request.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

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