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April 8, 1993

Mr. Ian Y. Lind
c/o Honolulu Star-Bulletin
P. O. Box 3080
Honolulu, Hawaii 96802

Dear Mr. Lind:

Re: Native Hawaiian Revolving Loan Fund

This is in response to your letter requesting the Office of Information Practices ("OIP") to provide you with an advisory opinion regarding whether the Office of Hawaiian Affairs ("OHA") must make available for public inspection and copying certain information concerning loans granted from the Native Hawaiian Revolving Loan Fund ("NHRLF").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), OHA must make available for public inspection and copying the names and business addresses of persons who received loans from the NHRLF ("NHRLF recipients"), and the amounts, purposes, and statuses of the loans granted to NHRLF recipients.

BRIEF ANSWER

Section 92F-12(a)(8), Hawaii Revised Statutes, requires agencies to make available for public inspection and copying the "[n]ame, address, and occupation of any person borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan." Based upon a review of the legislative history behind this UIPA provision, we believe that the Legislature intended that the term "state or county loan program" would encompass loan programs that grant loans from funds that are ultimately derived from State or county tax revenues. Consequently, we do not believe that the NHRLF constitutes a "state or county loan program" for purposes of section 92F-12(a)(8), Hawaii Revised Statutes, because the NHRLF

is a loan program established and governed by federal law and regulations, overseen by a federal agency, and funded by a Congressional appropriation.

Under the UIPA's general rule of required agency disclosure of government records, however, information maintained by OHA regarding a NHRLF recipient's name, business address, and loan amount, purpose and status must be made available for public inspection and copying unless an exception to disclosure applies. As discussed herein, we find that none of the UIPA's exceptions to disclosure applies to this information.

Section 92F-14(b)(6), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in information that reveals the individual's finances or financial history or activities. However, where a NHRLF recipient is an individual, we find that the NHRLF recipient's privacy interest in the recipient's name and loan amount, purpose, and status would be outweighed by the public interest in the disclosure of this information, since it sheds light upon one of OHA's functions, namely, "[t]o apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians." Haw. Rev. Stat. § 10-6(a)(8) (1985). The disclosure of this information would also promote one of the important policies that underlies section 92F-12(a)(8), Hawaii Revised Statutes, which is to prevent special treatment in the administration of loan programs by a state or county agency. See Vol. I Report of the Governor's Committee on Public Records and Privacy 114-5 (1987). Thus, we find that this information about a NHRLF loan, as well as the NHRLF recipient's business address, does not fall within the scope of the UIPA's exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

Furthermore, we find that a NHRLF recipient's name and the described NHRLF loan information do not constitute confidential commercial or financial information which would be protected by the UIPA's 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. 1992). Also, because we find no State or federal statute that makes this information confidential, the information would not fall within the UIPA exception for "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1992).

Because none of the UIPA's exceptions to disclosure apply, OHA must, upon request, make available for public inspection and

copying the following information about a NHRLF recipient: name, business address, loan amount, loan purpose, and loan status.

FACTS

The NHRLF was established by the 1987 amendments, Pub. L. 100-75, 101 Stat. 973, 976, to the federal Native American Programs Act of 1974, 42 U.S.C. § 2991b-1 ("NAPA"), as a five-year demonstration project to be implemented by the Administration for Native Americans, U.S. Department of Health and Human Services ("ANA"). Under the NAPA, the ANA was required to award grants during the five-year period to either "one agency of the State of Hawaii, or to one community-based Native Hawaiian organization whose purpose is the economic and social self-sufficiency of Native Hawaiians" to administer the NHRLF. 42 U.S.C. § 2991b-1 (1988).

In 1988, after soliciting applications from eligible agencies and organizations, the ANA selected OHA as the loan administrator of the NHRLF. In its role as the loan administrator under the NHRLF, OHA makes loans to Native Hawaiian organizations and individual Native Hawaiians for the purpose of "promoting economic development among Native Hawaiians in the State of Hawaii." 45 C.F.R. § 1336.63(a) (1992). OHA was also required to develop, subject to the ANA's approval, the criteria and procedures for making loans under the NHRLF. 45 C.F.R. § 1336.63(b) (1992).

In 1992, Congress amended the NAPA to reauthorize the NHRLF for an additional three years, and specifically designated OHA as the loan administrator. In the 1992 amendments to the NAPA, Congress allocated $1 million for each additional year of the NHRLF and required that OHA "contribute to the revolving loan fund an amount of non-Federal funds equal to the amount of such grant." Native American Program Act Amendments of 1982, P.L. 102-375, § 822, 106 Stat. 1295, 1296 (1992). According to OHA, it has not yet determined from what sources it will obtain the funds for meeting this requirement to match the federal grant.

In a letter dated December 3, 1992, you requested OHA to provide you with information concerning the loans made under the NHRLF, specifically the NHRLF recipients' names, business addresses, and loan amounts, purposes, and statuses, including any defaulted loans. In your letter to OHA, you noted that section 92F-12(a)(8), Hawaii Revised Statutes, requires each government agency to make available for public inspection and duplication during regular business hours the "[n]ame, address, and occupation of any person borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan." However, both OHA and the ANA contend that the

NHRLF is not a "state or county loan program," but rather it constitutes a loan program that is established and financed by the federal government and only administered by OHA.

OHA informed you that the information that you requested concerning the NHRLF would not be disclosed to you unless the OIP opines that the information must be publicly disclosed under the UIPA. Consequently, you requested the OIP to render an advisory opinion on this matter.

DISCUSSION

I. APPLICABILITY OF THE UIPA TO OHA RECORDS

The Office of Hawaiian Affairs ("OHA") was established in 1979 under section 5 of Article 12 of the Constitution of the State of Hawaii and chapter 10, Hawaii Revised Statutes. OHA was created as a "body corporate which shall be a separate entity independent of the executive branch." Haw. Rev. Stat. § 10-4 (1985). Although OHA is not attached to the executive branch, the Legislature intended that OHA would "assume a status of a state agency" as contemplated by the 1978 Constitutional Convention in proposing the creation of OHA. S. Stand. Comm. Rep. No. 773, 10th Leg., 1979 Reg. Sess., Haw. S.J. 1338, 1341 (1979); see also S. Stand. Comm. Rep. No. 784, 10th Leg., 1979 Reg. Sess., Haw. S.J. 1350, 1352 (1979) (OHA "can only be established as a government agency"). Consequently, for purposes of applying the provisions of the UIPA, we believe that OHA constitutes an "agency," as this term is defined in section 92F-3, Hawaii Revised Statutes. Cf. OIP Op. Ltr. No. 89-9 at 4 (Nov. 20, 1989) (University of Hawaii established as a "body corporate" under the State Constitution is an "agency" under the UIPA).

The UIPA applies to "government records," which means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Because information about NHRLF loans and their recipients is maintained by an "agency," this information constitutes a "government record" subject to the provisions of the UIPA.

II. INFORMATION ABOUT STATE OR COUNTY LOAN PROGRAMS

As its general rule, the UIPA states 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. 1992). In addition to this general rule, section 92F-12, Hawaii Revised Statutes, lists categories of records that, "[a]ny provision to the contrary notwithstanding each agency shall make available for

public inspection and duplication during regular business hours." With regard to the categories of records listed in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history explains that "[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

Along with other types of records, section 92F-12, Hawaii Revised Statutes, requires the public disclosure of the "[n]ame, address, and occupation of any person borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan." Haw. Rev. Stat. § 92F-12(a)(8) (Supp. 1992). At first glance, the NHRLF appears to be a "state or county loan program" under this provision since the NHRLF is administered by an "agency" of the State.

Yet, in examining the legislative intent behind the language used in section 92F-12(a)(8), Hawaii Revised Statutes, we note that many of the records listed in section 92F-12, Hawaii Revised Statutes, were included by the Legislature in response to recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report"). See, e.g., OIP Op. Ltr. No. 90-29 (Oct. 5, 1990); OIP Op. Ltr. No. 91-14 (Aug. 28, 1991). With respect to government records concerning state or county loan programs, the Governor's Committee Report stated:

> Those that seek access [to information concerning recipients in state and county loan programs] are essentially asserting that these are taxpayer funds and that taxpayers should be able to see how those funds are spent. In addition, however, since most of these programs have more applicants than funds, there is also a strong interest in assuring that no special treatment has been given to anyone and that the process has been fair in all respects.
>
> . . . .
>
> One way to approach this area is to specify that certain information (name, occupation, amount of loan, and purpose of loan) should be public. . . . As to loan status, repayment and enforcement efforts, it clearly is a policy choice. This is personal information but it is also taxpayer money

> which if not repaid, is not serving its function.

Vol. I Report of the Governor's Committee on Public Records and Privacy 114-5 (1987) (emphases added).

This excerpt from the Governor's Committee Report points out several times that the public has an interest in information about loan programs because these programs are spending "taxpayer money." Based upon this excerpt from the Governor's Committee Report, we believe that the term "state or county loan program," as used in section 92F-12(a)(8), Hawaii Revised Statutes, refers to a program that grants loans from funds that are ultimately derived from State or county tax revenues.

Consequently, for purposes of applying section 92F-12(a)(8), Hawaii Revised Statutes, we do not believe that the Legislature contemplated that the term "state or county loan program" would encompass the NHRLF, which is a loan program established and governed by federal law and regulations, overseen by a federal agency, and funded by a Congressional appropriation. We note, however, that in the three-year extension of the NHRLF, OHA is specifically named as the loan administrator and required to match the federal contribution to the NHRLF from its own funds. Since OHA has not yet identified the source of the funds that it will use to match the federal NHRLF contribution, the OIP is unable to determine, at this time, whether state tax revenues would be utilized for the OHA's contribution and whether, as a result, the NHRLF would become, at least in part, a "state or county loan program" during its three-year extension.

Although the NHRLF may not constitute a "state or county loan program" under section 92F-12(a)(8), Hawaii Revised Statutes, we must also determine whether government records concerning NHRLF loans and their recipients are nonetheless required to be made available under the UIPA's general rule of public access.

III. GENERAL RULE OF PUBLIC ACCESS AND EXCEPTIONS

As further clarification of its general rule, the UIPA states 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." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992) (emphasis added). Thus, agencies can withhold access to government records, or portions thereof, but only to the extent that the information falls within one or more of the exceptions to

required disclosure set forth in section 92F-13, Hawaii Revised Statutes.

We find that the following UIPA exceptions are relevant to the NHRLF loan records based upon the facts before us:

> **§92F-13 Government records; exceptions to general rule.** This chapter shall not require disclosure of:
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> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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> . . . .
>
> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
>
> (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; . . . .

Haw. Rev. Stat. § 92F-13(1), (3), (4) (Supp. 1992). We will address each of these exceptions separately below.

A. Clearly Unwarranted Invasion of Personal Privacy

For purposes of applying the UIPA's "clearly unwarranted invasion of personal privacy" exception, we must point out that only the "privacy interests of the individual," are recognized by the UIPA. Haw. Rev. Stat. § 92F-14(a) (Supp. 1992) (emphasis added). The term "individual" means "a natural person." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (definition of "individual"). Consequently, the OIP has previously noted that corporations, associations, and other fictional entities do not have privacy interests recognized under the UIPA. See, e.g., OIP. Op. Ltr. No. 92-17 (Sept. 2, 1992). Thus, the UIPA's "clearly unwarranted invasion of personal privacy" exception does not apply to information about NHRLF recipients who are not "individuals."

As for an individual's privacy interest in a government record, the UIPA "balances" this interest against the public interest in disclosure of the information. Specifically, under

the UIPA, "the [d]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." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992). Furthermore, the UIPA's legislative history instructs 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); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

Section 92F-14(b), Hawaii Revised Statutes, sets forth "examples of information in which the individual has a significant privacy interest," including:

> (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness; . . . .

Haw. Rev. Stat. § 92F-14(b)(6) (Supp. 1992). Individually identifiable information maintained by OHA about an individual's NHRLF loan amount, purpose, and status may arguably constitute "[i]nformation describing an individual's finances . . . financial history or activities, or credit worthiness." Id. If so, NHRLF recipients who are individuals would have a significant privacy interest in this information about their NHRLF loans, but this interest must still be balanced against the public interest in the disclosure of this information.

In previous OIP advisory opinions, we concluded that the public interest to be considered under the UIPA's balancing test is the public interest in the disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory purpose," and in "information which sheds light upon the conduct of government officials." See, e.g., OIP Op. Ltr. No. 92-17 (Sept. 2, 1992); OIP Op. Ltr. No. 91-19 (Oct. 18, 1991); OIP Op. Ltr. No. 90-7 (Feb. 9, 1990). We reached this conclusion in view of two basic policies served by the UIPA, which are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." Haw. Rev. Stat. § 92F-2 (Supp. 1992). We have also previously opined that the public interest behind the UIPA is "not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about any agency's own conduct." OIP Op. Ltr.

No. 89-16 (Dec. 27, 1989), quoting United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

We believe that the disclosure of the names of individuals who are NHRLF recipients, and the loan amounts, purposes, and statuses would shed substantial light on OHA's performance of its statutory purposes. Specifically, one of the duties of OHA is "[t]o apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians." Haw. Rev. Stat. § 10-6(a)(8) (1985).

In our opinion, the disclosure of the described information about NHRLF loans disbursed by the OHA in fulfilling its duty would serve the public's "strong interest in assuring that no special treatment has been given to anyone and that the process has been fair in all respects." Vol. I Report of the Governor's Committee on Public Records and Privacy 114-5 (1987); see also OIP Op. Ltr. No. 89-4 (public interest in the disclosure of Hawaiian Home Lands Waiting List). This public interest, among other things, apparently prompted the Legislature to expressly require the availability of similar information about "a state or county loan program" under section 92F-12(a)(8), Hawaii Revised Statutes, and is no less substantial when the funds administered by an agency are federal, rather than State or county, funds.

Consequently, we find that the public interest in the disclosure of the names of NHRLF recipients and the amounts, purposes, and statuses of their NHRLF loans would outweigh the individual recipients' privacy interest in this information. Thus, in our opinion, the disclosure of this information would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.[1] Cf. Miami Herald Publishing Co. v. United States Small Business Administration, 670 F.2d 610 (5th Cir. 1982); Buffalo Evening News, Inc. v. Small Business Administration, 666 F. Supp. 467

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[1]In the facts before us, we are not required to determine whether the UIPA requires the disclosure of information about an individual NHRLF loan recipient's "finances, income, assets, liabilities, net worth, bank balance, financial history or activities, or credit worthiness" contained in financial statements or other records that may have been considered by OHA to determine the individual's loan qualifications. We note that, in section 92F-14(b)(6), Hawaii Revised Statutes, the UIPA expressly recognizes an individual's significant privacy interest in such financial information. In most cases, we believe that an individual's significant privacy interest in this information would generally outweigh the public interest in disclosure.

(W.D.N.Y. 1987) (cases finding that identities of individual recipients of SBA loans and advances, and the amounts and statuses of the SBA loans and advances received, did not fall within the "clearly unwarranted invasion of personal privacy" exemption under the federal Freedom of Information Act).

Lastly, we have previously opined that individuals' business addresses do not fall within the scope of the UIPA's "clearly unwarranted invasion of personal privacy" exception. See, e.g., OIP Op. Ltr. No. 92-18 (Sept. 16, 1992). Consequently, OHA must publicly disclose the business addresses of individuals who are NHRLF recipients.

B. Confidential Commercial and Financial Information

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to make available for public inspection and copying "[g]overnment records, that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1992). In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature provided examples of government records that could be withheld under this UIPA exception "if disclosure would frustrate a legitimate government function," including, among other things, "[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).

In several OIP opinion letters, we have found guidance in case law applying Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1988) ("FOIA") when determining whether information constitutes "confidential commercial and financial information." See, e.g., OIP Op. Ltr. No. 91-29 (Dec. 26, 1991); OIP Op. Ltr. No. 92-17 (Sept. 2, 1992). As we have previously noted, the federal courts have found that commercial and financial information is "confidential" if its disclosure would likely: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) ("National Parks").

Federal courts have held that information concerning loans and advances made by the Small Business Administration does not constitute "confidential commercial or financial information" under the National Parks test. See Miami Herald Publishing Co. v. United States Small Business Administration, 670 F.2d 610 (5th Cir. 1982); Buffalo Evening News, Inc. v. Small Business Administration, 666 F. Supp. 467 (W.D.N.Y. 1987). In both of

these cases, the SBA argued that the disclosure of the statuses of certain loans that it made would cause substantive harm to the business recipients, for example, by creating "an impression with the general public of the business's financial instability" or allowing the competition to "take advantage of the poor creditworthiness or economic condition of the company." Buffalo Evening News, Inc., 666 F. Supp. at 470; Miami Herald Publishing Co., 670 F.2d at 614 n. 8. However, in each case, the court found that the SBA failed to establish the likelihood of competitive injury to its borrowers. In addition, in Buffalo Evening News, Inc., the court also rejected the SBA's contention that the disclosure of loan information would harm the SBA's ability to conduct its business. Buffalo Evening News, Inc., 666 F. Supp. at 471.

Similarly, we do not believe that the disclosure of a NHRLF recipient's name, business address, and loan amount, purpose, and status would likely impair the OHA's ability to obtain necessary information in the future from persons applying for or receiving NHRLF loans. We also find that this information does not reveal the type of detailed information about a recipient's business operations that we have previously found would likely cause substantial competitive harm. See, e.g., OIP Op. Ltr. No. 91-29 (Dec. 23, 1991) (Matson Navigation Company's workpapers in support of a general rate increase).

Consequently, because a NHRLF recipient's name, business address, and the amount, purpose, and status of the NHRLF loan would not constitute "confidential commercial or financial information" under the National Parks test, we conclude that this information would not fall within 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. 1992).

C. Records Protected by State or Federal Law

The UIPA does not require the disclosure of "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1992). In our research, we were unable to find any State or federal law that prohibits or restricts the disclosure of information concerning a NHRLF recipient's name, business address, and loan amount, purpose, and status. Furthermore, upon our inquiry, both the OHA and the ANA confirmed that, to their knowledge, there was no such State or federal law. Consequently, the exception to required agency disclosure in section 92F-13(4), Hawaii Revised Statutes, does not apply.

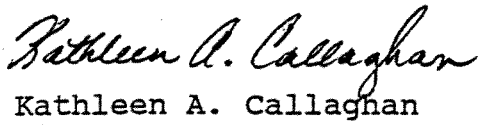
CONCLUSION

We find that none of the UIPA's exceptions to disclosure in section 92F-13, Hawaii Revised Statutes, applies to information regarding a NHRLF recipient's name, business address, and loan amount, purpose, and status. Specifically, we believe that the disclosure of this information would not constitute a clearly unwarranted invasion of privacy, nor would the disclosure of this information frustrate a legitimate government function. Furthermore, we do not find that this information is protected from disclosure by State or federal law. Consequently, under the UIPA, OHA must make this information available for public inspection and copying upon request.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

LJL:sc\OL93-1
c: Honorable John Waihee
Richard Paglinawan
Office of Hawaiian Affairs