

Op. Ltr. 93-16 Disclosure of Condominium Association Registry

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.



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DEPARTMENT OF THE ATTORNEY GENERAL
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October 1, 1993

The Honorable Clifford K. Higa
Director
Department of Commerce and Consumer Affairs
P.O. Box 3469
Honolulu, Hawaii 96801

Attention: Ms. Noe Noe Tom
Licensing Administrator

Dear Mr. Higa:

Re: Disclosure of Condominium Association Registry

This is in reply to Ms. Noe Noe Tom's letter to the Office of Information Practices ("OIP") dated March 31, 1993, requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether the State of Hawaii's Real Estate Commission ("Commission") must make a computerized condominium association registry ("computerized registry") available for public inspection and copying, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

BRIEF ANSWER

Yes. In our opinion, the computerized registry in its current form must be made available for public inspection and copying upon request, after individuals' addresses and telephone numbers have been segregated. In previous OIP advisory opinions, we found that the disclosure of an individual's home address and home telephone number would constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. We see no reason to depart from the conclusion that individuals' privacy interest in their home addresses and home telephone numbers outweighs the public interest in disclosure.

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The current computerized registry contains the addresses and telephone numbers of individuals, some of which are residential addresses and telephone numbers. Because they are identified only as "addresses" and "telephone numbers," it is not possible to determine by examining the computerized registry alone whether these addresses and telephone numbers are the individuals' "public" mailing addresses and telephone numbers, or the "residence" addresses and telephone numbers, provided on the Condominium Association Registration Applications ("Application"). Therefore, we conclude that the Commission may not make any of the addresses and telephone numbers in the computerized registry available for public inspection and copying, because the disclosure of this information would constitute a "clearly unwarranted invasion of personal privacy."

FACTS

Section 514A-95.1, Hawaii Revised Statutes, requires each condominium project having six or more units to register annually with the Commission and to provide information such as "the name, business address, and phone number of a designated contact person for the association." Haw. Rev. Stat. § 514A-95.1 (Supp. 1992). The OIP is informed that the Commission developed the Application form to implement section 514A-95.1, Hawaii Revised Statutes. A copy of the Application form is attached as Exhibit A. The Application form seeks, among other items of information, the "residence address" and the "residence telephone no." of the president of the board of directors and the association's contact person.

In Ms. Noe Noe Tom's letter to the OIP dated March 31, 1993, Ms. Tom explains that "[t]he Commission's staff uses information from the application form to create a computer database registry." The March 31, 1993 letter further states that the "[a]ddresses are entered without distinction whether it is a public or residential address. It's simply shown as an 'address.'" Similarly, the telephone numbers, whether public or residential, are shown in the registry merely as "telephone numbers."

DISCUSSION

I. COMPUTERIZED CONDOMINIUM ASSOCIATION REGISTRY IS A GOVERNMENT RECORD

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. 1992). Under the UIPA, the term "[g]overnment record" means information maintained by an agency in written, auditory, visual, electronic,

or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added). Thus, the computerized registry is a "government record" subject to the UIPA's disclosure provisions.

The UIPA further provides that unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, the records must be made available for inspection and copying upon request by any person. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). The only one of the UIPA's statutory exceptions to required agency disclosure that would arguably apply to some of the information in the computerized registry is set forth in section 92F-13(1), Hawaii Revised Statutes. Under section 92F-13(1), Hawaii Revised Statutes, agencies must not disclose information that, if disclosed, would constitute a "clearly unwarranted invasion of personal privacy."

II. RESIDENTIAL ADDRESSES AND TELEPHONE NUMBERS PROTECTED FROM DISCLOSURE

In previous OIP advisory opinions, we have found that an agency's disclosure of an individual's home address and home telephone number would constitute a "clearly unwarranted invasion of personal privacy" and, therefore, is protected from disclosure under section 92F-13(1), Hawaii Revised Statutes. See, e.g., OIP Op. Ltr. No. 89-13 (Dec. 12, 1989); OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-14 (Mar. 30, 1990).

The "addresses" in the computerized registry consist of a mixture of the residential addresses and "public mailing addresses" of individuals, and nothing in the registry differentiates the two types of addresses. Based on the principles of the OIP advisory opinions above referenced, we believe that the Commission's disclosure of the addresses and telephone numbers in the current computerized registry, which includes residential addresses and telephone numbers, would constitute a "clearly unwarranted invasion of personal privacy" under the UIPA. Consequently, the Commission must segregate the addresses and telephone numbers of individuals in the computerized registry, before making the computerized registry available for public inspection and copying.

III. EFFECT OF SECTION 514A-95.1, HAWAII REVISED STATUTES

The OIP is informed that the Commission believes that section 514A-95.1, Hawaii Revised Statutes, may make the residential addresses of contact persons contained in the registry public. Although section 514A-95.1, Hawaii Revised Statutes, provides that the contact person's "name, business address, and phone number" shall be submitted to the Commission

annually, it does not explicitly require that the information submitted be made public. Further, in our review of chapter 514A, Hawaii Revised Statutes, known as the Condominium Property Act, we did not find any provision that explicitly makes the Applications public. Therefore, our conclusion that the UIPA prohibits disclosure of the undifferentiated addresses and telephone numbers in the current computerized registry is unaffected by the provisions of section 514A-95.1, Hawaii Revised Statutes.

IV. EFFECT OF OIP OPINION LETTER NO. 92-18 (SEPT. 16, 1992)

Ms. Tom's letter to the OIP dated March 31, 1993 states that although "a hard copy of the registry has never been released to the public," the Commission has been re-examining the issue of public disclosure of the registry "in light of OIP Op. No. 92-18 . . . and in light of inquiries it has been receiving." We do not believe the principles set forth in that opinion are applicable to the computerized registry in its current form.

In OIP Opinion Letter No. 92-18 (Sept. 16, 1992), we found that pesticide applicators who worked out of their homes and who listed their home addresses as their business addresses on applications for certification had a diminished privacy interest in their home addresses. In contrast, in the facts before us, one cannot discern which of the addresses in the computerized registry are used by contact persons as both their residential and business, or "public," addresses. Because the computerized registry in its current form does not distinguish those addresses that are purely residential from those that are business or used for both residential and business purposes, the principles of OIP Opinion Letter No. 92-18 (Sept. 16, 1992) do not apply, and the addresses in the computerized registry may not be publicly disclosed.

We emphasize that our discussion here is limited to the addresses in the current computerized registry, as distinguished from the "public mailing" and "residence" addresses and telephone numbers as listed on the Applications. With respect to the addresses and telephone numbers on the Applications, in our opinion an individual would not have a significant privacy interest in that individual's "public mailing address" or "public telephone number," even if the public mailing address or public

telephone number is also that individual's residential address or residential telephone number, respectively.¹

V. EFFECT OF NOTICE ON APPLICATION FORM

Additionally, we do not believe that the Application form's statement that "[t]he name and address of the contact person will become public information" changes our conclusion that the registry addresses must not be disclosed. The UIPA provides that each agency shall disclose "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers." Haw. Rev. Stat. § 92F-12(b)(1) (Supp. 1992). In our opinion, the "notice" does not constitute the "prior written consent" of the contact person to disclose that individual's residential address. In fact, based on our review of the application form, it appears that the contact person is not necessarily the same individual who signs the application form. Additionally, it is not clear as to what "address" the "notice" refers; that is, the "public mailing address," the "residence address," or both.

VI. EFFECT OF ASSURANCES OF CONFIDENTIALITY

Ms. Tom's March 31, 1993 letter to the OIP states the Commission's concern that the UIPA "may be violated if [the registry] were provided to the public because (1) staff may have informed registrants that residence addresses would remain confidential (based on OIP Op. No. 91-1),² and (2) the application form may give the impression that residential addresses would remain confidential." As above discussed, it is the UIPA itself that prohibits disclosure of the residential addresses, and not the express or implied representations of the Commission staff or the application form.³

¹See OIP Op. Ltr. No. 91-1 (Feb. 15, 1991) (a "public record address" provided on a massage therapist license application must be made available for public inspection and copying).

²In OIP Opinion Letter No. 91-1 (Feb. 15, 1991), we found that public disclosure of a licensee's home address and home telephone number would constitute a clearly unwarranted invasion of personal privacy.

³We note that the OIP previously opined that an agency may not validly make a promise of confidentiality that would circumvent the disclosure requirements of the UIPA. See, e.g., OIP Op. Ltr. No. 90-2 (Jan. 18, 1990); OIP Op. Ltr. No. 90-39 (Dec. 31, 1990).

VII. COMPILATION OF RECORDS

Under the UIPA, "an agency shall not be required to prepare a compilation or summary of its records," "[u]nless the information is readily retrievable in the form in which it is requested." Haw. Rev. Stat. § 92F-11(c) (Supp. 1992). Thus, the Commission is not required by the UIPA to compile a new computerized registry that contains the names and "public" addresses and "public" telephone numbers of the contact persons. However, we note that a requester has the option of inspecting and copying the records from which the registry is derived, that is the Applications. If that option is chosen, the agency would be required to review the Application forms and segregate the residential addresses and the residential telephone numbers.

CONCLUSION

For the reasons stated above, we conclude that the addresses and telephone numbers as contained in the current computerized registry are protected from public disclosure under section 92F-13(1), Hawaii Revised Statutes. Therefore, under the UIPA, the addresses and telephone numbers must be segregated from the computerized registry before it is made available for public inspection and copying.

Very truly yours,

Mimi K. Horiuchi
Mimi K. Horiuchi
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Kathleen A. Callaghan
Director

MKH:sc

1993

CONDOMINIUM ASSOCIATION REGISTRATION APPLICATION

FOR OFFICE USE	
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DEADLINE: JANUARY 1, 1993

1. Name of Condominium Project: _____
 Project Reg. No. _____ Total No. of Apartments: _____

2. Street Address: _____

3. President of the Board of Directors: _____

Public Mailing Address: _____

Residence Address: _____

Public Telephone No.: _____ Residence Telephone No.: _____

4. Contact Person for Association and Title (if other than president): _____

Title: _____

Public Mailing Address: _____

Residence Address: _____

Public Telephone No.: _____ Residence Telephone No.: _____

5. Management Status:

Self-managed by Association of Apartment Owners (See information sheet for instructions.)
 Name of Manager: _____
 Telephone No.: _____

Managed by Condominium Managing Agent (See information sheet for instructions.)
 Name: _____
 CMA Reg No. _____
 Management Type: Fiscal Only Fiscal and Physical

6. Fidelity Bond: (See information sheet for bond requirements.)

Original policy of insurance/bonding is attached (for associations registering for the first time this year or previously registered associations which did not properly complete registration last year).

Original certificate of insurance/bonding is currently on file with the Commission and complies with all bond requirements.

Bond Exemption Application is attached.

7. Use: Indicate number of apartments in each type of use. (See information sheet for instructions.)

_____ Commercial _____ Agricultural
_____ Residential
_____ Other (e.g., Time share, hotel, etc., please specify. Indicate if figures given for "other" are estimates.):

8. Percentage of residential apartments in the project which are owner-occupied: _____ %

9. Is there a hotel operation, rental pool, or any apartment being offered for transient lodging of less than 30 days?
[] YES [] NO

10. Assessments:

State the total monthly amount of maintenance fees/assessments the association collects, \$ _____, or attach the association's most recent financial statement if it indicates that amount. (See information sheet for instructions.)

11. Reserves:

Has the association adopted a long-term budget for reserves (i.e., funds not required for immediate common expenses, or funds for future capital improvements, major repairs and maintenance, or unexpected common expenses)?
[] Yes [] No

If yes, state the amount of reserves as of this date \$ _____, or attach the association's schedule or statement of reserves for the month or quarter prior to the date you complete this form. (See information sheet for instructions.)

Has the association established separate reserve accounts or investments to provide funding for the types of expenses described in the previous section?
[] Yes [] No

12. Audit:

Date of association's most recent audit: _____ Date of unannounced verification of association's cash balance: _____
(If unknown, please indicate.)

Name of public accountant who conducted audit: _____
Name of public accountant who conducted cash verification: _____

13. Land Ownership Information: (The following three (3) sections refer to the ownership of the LAND underlying the building(s)/project. Complete ONLY ONE of the sections.)

(i) [] Fee Simple
a. [] Originally fee (i.e., from date of original sale)
b. [] Originally leasehold but converted to fee (If any part of fee is owned by other than the apartment owners or association, complete "Partially Converted", section (iii). See information sheet)

(ii) [] Leasehold

(iii) [] Partially Converted (i.e., Originally leasehold but now some apartments owned in fee by apartment owners or association, but not all). Number of apartments not converted: _____

14. Ground lease information for apartments in project which are still in leasehold:

Total lease term (e.g., 30, 55, 65 years): _____

Termination/Expiration Date: _____

Previous renegotiation date (if any): _____

Next renegotiation date: _____

Present yearly amount of ground lease rent for a representative apartment: _____

Yearly amount of ground lease rent for a representative apartment prior to previous renegotiation (if any): _____

Type of apartment used as representative apartment: _____

Name(s) of Lessor(s) of leasehold apartments (including those in a partially converted building which were not purchased by individual apartment owners or association): _____

CERTIFICATION OF ASSOCIATION PRESIDENT, VICE PRESIDENT, SECRETARY, OR TREASURER:

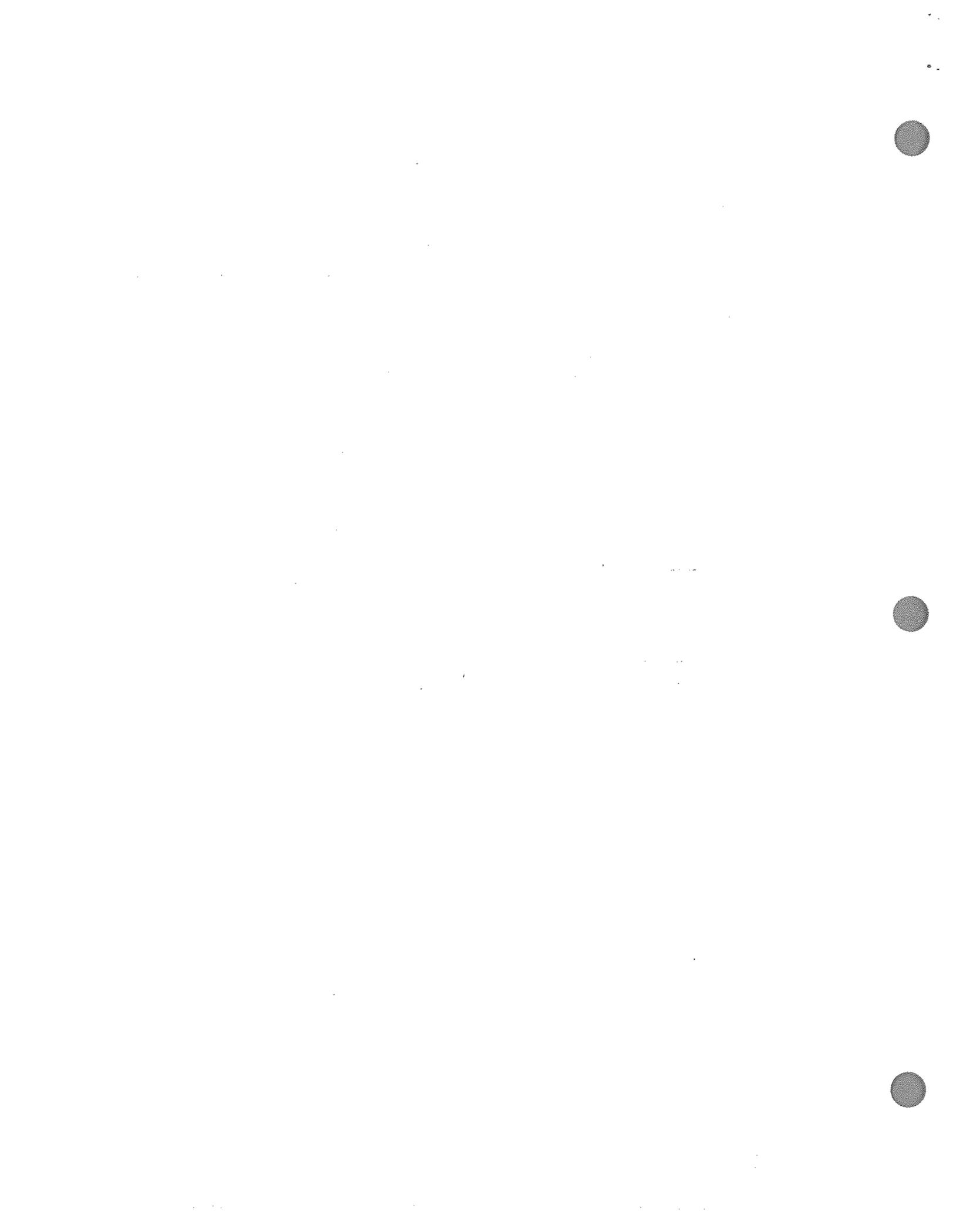
I hereby certify that, I am authorized to sign this certificate and that the information provided on this registration form and the attachments are true and correct. I understand that knowing or intentional misrepresentation may result in legal liability (Sections 514A-98 and 710-1017, Hawaii Revised Statutes).

Signature

(Please print name)
President [] Vice-President [] Secretary [] Treasurer []

Subscribed and sworn to before me this _____ day of _____, 19__

Notary Public, State of _____
My Commission expires: _____



CONDOMINIUM ASSOCIATION REGISTRATION, BONDING, AND EDUCATION FUND

Information and Instructions

REGISTRATION

Who must register: All condominium associations of apartment owners comprised of **six or more apartments** (regardless of whether the association retains a condominium managing agent or self-manages its project).

Complete the attached registration application (which must be signed by **any officer** of the association before a notary public). Please type or print legibly in black ink.

Fees: Attach payment of \$25 registration fee.

Penalties for late payment and failure to register: A \$25 penalty fee will be charged. In addition, an association may not bring any suit in State court until it registers with the Commission.

Education Fund: All condominium associations of apartment owners comprised of **six or more apartments** must pay into the education fund. The total due is two dollars (\$2) multiplied by the number of apartments in the association. Apartments include any use, whether residential, commercial, parking, industrial, agricultural, etc.

Penalties for late payments or failure to pay education fund: A penalty of 10% of the amount due will be charged for payments not received by deadline date. In addition, the association shall not have standing to bring any action to collect or foreclose any lien for common expenses or other assessments in State court until the amount due, including any penalty, is paid.

Bond: The Commission cannot process an association's registration application unless: (1) It is submitted with a fidelity bond policy of insurance which complies with the requirements stated on the attached sheet, and (2) The Commission currently has on file a fidelity bond certificate of insurance which complies with the requirements stated on the attached sheet and which indicates that the bond is fully valid and in effect through 1993, or (3) The commission approves a bonding exemption based on the criteria stated on the attached sheet. Refer to the attached CONDOMINIUM ASSOCIATION FIDELITY BOND REQUIREMENTS for information on specific bond requirements.

Make checks payable to: Commerce and Consumer Affairs.

Note: A \$7.50 service fee will be charged for checks which are not honored by the bank.

A complete application consisting of the application form, the registration fee, and the education fund fee is DUE ON OR BEFORE JANUARY 1, 1993.

Department Address:

Mail or deliver all required items to:

Real Estate Commission
Association Registration
250 South King Street, Room 702
Honolulu, HI 96813

Phone: (808) 586-2644

Effect of Failure to Submit Information Required by Statute or Rules:

The Commission may reject or terminate any registration of an association of apartment owners for failure to submit written confirmation of any of the information required by statute or Commission rules.

Instructions for Completing the Form:

1. The project registration number is the number given the project when it is first registered with the Commission prior to sale (leave space blank if you do not know this number).
2. "Street Address" refers to the physical location of the project.
3. All information in the condominium association registration application is considered public information unless ruled otherwise by the Office of Information Practices.
4. The name and address of the contact person will become public information.

5. "Self-managed" refers to associations which manage their projects with the help of volunteers or association employees but which do not retain the services of an independent managing agent. Any person paid to help manage the project who is not a direct employee of the association may be considered an independent managing agent (see Section 514A-3, Hawaii Revised Statutes). Call the Real Estate Commission if you have any questions on your association's status.

"Fiscal" management refers to accounting, budgeting, collecting, depositing, and disbursing funds for the association. Any person, including an accountant or bookkeeper, who is not an employee and who collects, deposits, or disburses funds for the association is considered a fiscal managing agent. "Fiscal and physical" refers to fiscal management and the management of the physical property and any personnel of the association.

6. Note: **BOND EXEMPTION** Application must be filed yearly. See attached CONDOMINIUM ASSOCIATION FIDELITY BOND REQUIREMENTS.
7. "Commercial" refers to any commercial use of an apartment for stores, offices, and businesses, except "industrial" which should be included in the "Other" category.

"Residential" refers to any use of an apartment as a dwelling, except that apartments known to be used for short-term rentals of 30 days or less should be included in the "Other" category as "hotel". Units known to be in a timeshare plan also should be included in the "Other" category.

8. "Owner occupied" refers to an apartment occupied by the owner and not rented or leased. Please indicate if figures are estimates.
9. Indicate if there is a hotel operation, rental pool, or transient rentals in the project.
10. The Commission wishes to determine the amount of maintenance fees/assessments being collected from owners on a regular basis. If you attach a financial statement, it should clearly show the amount being collected from owners for the month or quarter prior to the date you complete this form. You may attach any statement clearly indicating that information, if a financial statement is not available. Please indicate if the statement does not represent an accurate view of association assessments.
11. As condominium projects in Hawaii age, long-term planning for future capital improvements, repairs, and unexpected expenses becomes more important. The Commission wishes to determine to what extent associations are engaged in long-term planning and in actually setting aside reserves for the future.

If the statement attached for the section on assessments clearly shows the amount of association reserves and with whom they are invested or deposited, you need not attach another statement. Otherwise, please attach a statement indicating that information about association reserves, if they exist. Again, please indicate if the statement does not represent an accurate view of association reserves.

12. Some associations vote not to have audits. If the date of the association's last audit is unknown, please indicate. The name of the public accountant performing the audit, not the individual, is sufficient. However, if the association has twenty or more **owners**, an annual audit is required.
13. Accurate information on the ownership of the land beneath condominium projects is needed. If the lessor has sold the fee interests for some or all of the apartments in a condominium project which was originally leasehold, the project may be characterized in one of two ways. If the association purchased all of the fee interest of the land beneath your project which was not purchased by the apartment owners, your project is considered "*fee simple*." If each owner did not purchase the percentage fee interest attributed to his or her apartment and that percentage fee interest was not purchased by the association, your project is considered "*partially converted*." If the project is partially converted, please indicate, to the best of your knowledge, the number of apartments not converted to fee simple at the time of registration. For the purposes of this question, "*not converted to fee simple*" means that the owner has not closed a sales transaction for the purchase of the percentage fee interest.

For the first 20 to 30 years, most condominium project leases have their ground lease rent fixed at a certain amount, although that amount may increase in two or three steps. After the period of fixed lease rent, many ground leases provide that for the remainder of the lease, the rent amount shall be negotiated between the owners of the apartments or the association (lessees) and the owner of the land (lessor). Please indicate the previous renegotiation date (if any), the next renegotiation date, the present amount of ground lease rent, and the amount of ground lease rent paid prior to the previous renegotiation (if there has been a renegotiation). If ground lease terms vary from apartment to apartment, please include ground lease information for an apartment that is representative of the majority of apartments in the project. Please also indicate the type of apartment used as a representative apartment (e.g., studio, one bedroom, etc.).

Liability For Misstatements

The Commission expects and requires every board president, vice president, secretary, or treasurer to make a good faith effort to provide accurate information. That obligation should not be taken lightly and penalties can be imposed for false statements. Nevertheless, if after a good faith effort you are unable to answer a question correctly or accurately, please indicate and explain, if necessary.



CONDOMINIUM ASSOCIATION FIDELITY BOND REQUIREMENTS

Each condominium project having six or more apartments must secure annually through its association of apartment owners a fidelity bond or obtain a yearly bond exemption, as provided below.

Amount of Bond and Deductible. The amount of the fidelity bond shall be \$500 multiplied by the aggregate number of condominium apartments in the association, provided that the minimum bond amount shall not be less than \$20,000 and the maximum need not exceed \$100,000. The fidelity bond deductible shall not exceed \$2000 or 5% of the face amount of the bond, whichever is greater.

Coverage Required by Association of Apartment Owners Bond. The association of apartment owners fidelity bond shall:

- (1) Cover all officers, directors, employees, and managing agents of the association who have the authority to collect, deposit, transfer, or disburse association funds;
- (2) Name as the insured only the association registered with the Commission and no other person.

The association's board shall adopt a written resolution limiting persons who may handle association funds to those covered by the association's bond. Copies of these resolutions shall be available for review by any association members and provided to the Commission at its request.

Evidence of Fidelity Bond to be Provided to the Commission. Each association of apartment owners required to have a fidelity bond and registering for the first time in 1993, or any previously registered association of apartment owners which failed to register or submit proper evidence of bonding as required in 1991, shall submit an original policy of insurance/bonding to the Commission containing the requirements described below. Associations of apartment owners properly registered in 1991 and currently having on file with the Commission an original certificate of insurance/bonding which contains all of the requirements described below and which indicates that the bond is fully valid and in effect through 1993 need only notify the Commission of changes to the bond, in the manner described below.

The original policy of insurance/bonding and certificate of insurance/bonding currently on file for, each association of apartment owners required to have a fidelity bond shall:

- (1) Name the Department of Commerce and Consumer Affairs, Professional and Vocational Licensing Division, Real Estate Commission, P. O. Box 3469, Honolulu, Hawaii 96801, as "*certificate holder*";
- (2) Include a cancellation notification provision that the insurer shall notify the "*certificate holder*" in writing, 30 or more calendar days prior to the cancellation/termination of the bond;
- (3) State that the bond is a fidelity or employee dishonesty bond;
- (4) State the amount of any deductible or that no deductible applies to the bond;
- (5) Name only the association of apartment owners as the insured and no other person;
- (6) Include an expiration date or a statement that the bond is continuous;
- (7) State whether the bond is a blanket or name schedule/position type;
- (8) Indicate that the bond covers officers, directors, employees and managing agents who have authority to collect, deposit, transfer or disburse association funds; and
- (9) Not require criminal conviction before payment of loss.

The Commission may request a copy of the bond represented by the certificate.

Special Rules for Schedule/Position Bonds. If the fidelity bond provided is a "name schedule" or "position" bond, the schedule shall be attached to the certificate of insurance submitted to the Commission. The association of apartment owners also shall submit to the Commission a board resolution limiting the persons handling funds for the association to those persons covered by the schedule.

Notification to Commission of Changes to Fidelity Bond. The association shall notify the Real Estate Commission in writing of any amendments to the fidelity bond within 10 days of the amendments. If the amendments affect the information shown on the certificate of insurance or any bond schedule, the Commission shall also be provided with an amended certificate of insurance.

Bond Exemptions for Associations of Apartment Owners. The Commission may grant complete or partial bond exemptions to associations of apartment owners having twenty or less apartments. Please contact the Commission regarding the exemption or to request a copy of the exemption form.

Note: **BOND EXEMPTION** Application must be filed yearly.