

April 24, 1998

Mr. Tom Russi
P.O. Box 3586
Kailua-Kona, Hawaii 96745-3586

Re: Kona Community Hospital Inpatient Contracts

Dear Mr. Russi:

This is in response to Mr. Russi's request to the Office of Information Practices ("OIP") for an advisory opinion regarding public access to the maximum eligible charge amounts that are listed in contracts that Kona Community Hospital ("KCH") executed with two healthcare benefits companies, Hawaii Medical Service Association ("HMSA") and Hawaii Management Alliance Association ("HMAA"). For purposes of this opinion letter, a "maximum eligible charge" (also referred to as an "eligible charge") is a dollar amount that healthcare benefits companies use to calculate and pay KCH for medical services KCH provided to the enrollees of HMSA and HMAA.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the eligible charges, as set forth in the 1996 inpatient contract between KCH and HMAA ("HMAA Contract") and in the 1995 and 1996 inpatient contracts between KCH and HMSA ("HMSA Contracts") are open for public inspection and copying.

BRIEF ANSWER

Yes, the eligible charges within the HMAA Contract and the HMSA Contracts ("HMSA and HMAA Contracts") are open for public inspection and copying.

Under section 92F-13(3), Hawaii Revised Statutes, a government agency is not required to disclose records if doing so would frustrate the agency's legitimate government function. Under this "frustration" exception to disclosure, the OIP has opined that information is not required to be disclosed when it constitutes

confidential business information which, if disclosed, would frustrate a legitimate government function.

KCH has asserted that disclosure of the eligible charges within the HMSA and HMAA Contracts would not frustrate a legitimate government function of KCH. As KCH maintains the requested information and claims that the disclosure of the eligible charges would not frustrate its legitimate government function, the eligible charges are not exempt from public inspection and copying under section 92F-13(3), Hawaii Revised Statutes.

Furthermore, the eligible charges from the HMSA and HMAA Contracts do not constitute “confidential business information.” HMSA and HMAA have not persuaded the OIP that disclosure of the eligible charges within each company’s KCH contracts will cause substantial competitive harm to their respective competitive positions. As disclosure of the eligible charges will not likely cause substantial competitive harm to HMSA’s and HMAA’s competitive positions, the information requested does not qualify as confidential business information under section 92F-13(3), Hawaii Revised Statutes.

The OIP finds that the eligible charges are not confidential business information. The OIP also finds that KCH claims that disclosure of the information would not frustrate a legitimate government function. Therefore, the eligible charges within the HMSA and HMAA Contracts do not qualify for protection from disclosure under section 92F-13(3), Hawaii Revised Statutes, and thus this information should be made available.

FACTS

KCH is a community hospital facility on the Big Island of Hawaii. During the 1996 legislative session, the Hawaii Health Systems Corporation (“HHSC”) was created and certain community hospitals, including KCH, were placed under HHSC. See Chapter 323F, Hawaii Revised Statutes (Supp. 1997). HHSC is specifically recognized as a government agency. Haw. Rev. Stat. §323F-2(a) (Supp. 1997).

Beginning in October 1996, Mr. Russi initiated a series of UIPA requests that spanned the period of one year.¹ Mr. Russi first contacted the OIP on

¹ Between October 10, 1996 and October 25, 1997, Mr. Russi made several UIPA requests to KCH. During this period Mr. Russi asked the OIP to assist him with obtaining access to the KCH

October 10, 1996, seeking the OIP's assistance after KCH denied his request to see the eligible charge that HMSA reimbursed to KCH for its June 1996 treatment of Mr. Russi's spouse. During the months that followed, Mr. Russi modified and expanded his UIPA request. By June 1997, Mr. Russi had requested copies of contracts between KCH and healthcare benefits companies which contained the eligible charges used to calculate what these healthcare benefits companies would pay KCH for inpatient services provided to their enrollees. Specifically, Mr. Russi requested the 1995 and 1996 inpatient contracts that KCH executed with (1) HMSA; (2) HMAA; (3) the Hawaii Dental Service ("HDS"); and (4) Kaiser Foundation Health Plan ("Kaiser"). As of the date of this letter, it is the OIP's understanding that KCH has provided Mr. Russi with copies of the HDS and Kaiser Contracts.²

records. The following is a list of those UIPA requests with the date of requested OIP assistance in parenthesis:

- (1) Eligible charge which HMSA paid KCH for treatment of Mr. Russi's wife in June 1996 (October 10, 1996);
- (2) 1996 inpatient contract that KCH and HMSA executed (March 25, 1997);
- (3) 1995 inpatient contract that KCH and HMSA executed (May 5, 1997);
- (4) 1995 inpatient contracts that KCH executed with HMAA, HDS, and Kaiser (May 30, 1997);
- (5) 1996 inpatient contracts that KCH executed with HMAA, HDS, and Kaiser (June 15, 1997);
- (6) 1997 inpatient contracts that HMSA, HMAA, HDS, and Kaiser executed with HHSC on behalf of the twelve community hospitals (August 7, 1997).

In response to Mr. Russi's request for OIP's assistance, the OIP conducted an *in camera* review of the various KCH contracts listed in request numbers two through five. To assist in the OIP's determination regarding public access, the OIP invited HMSA, HMAA, HDS, and Kaiser to identify and explain what information they deemed to be "confidential" under the UIPA. Only HMSA and HMAA have asserted that their eligible charges are confidential. KCH has already provided Mr. Russi with a complete copy of the HDS and Kaiser contracts. Mr. Russi's sixth request will be handled separately. Most recently, on October 25, 1997, Mr. Russi clarified that the only information that he now seeks are the maximum eligible charges contained in the contracts requested.

² As KCH's agreement with HDS for 1995 and 1996 is contained in a single contract, Mr. Russi was provided with that contract. In addition, KCH only has one agreement with Kaiser, executed in 1996. Therefore, Mr. Russi was provided with a copy of that contract.

Most recently, in an October 25, 1997 letter, Mr. Russi advised the OIP that he was narrowing his UIPA request for records. Instead of *full and complete* copies of the contracts requested, he now seeks only the *maximum eligible charges* for inpatient services as set forth in the above-listed contracts that KCH executed with HMSA, HDS, HMAA, and Kaiser. As Mr. Russi has been provided with copies of the HDS and Kaiser contracts, this opinion letter discusses only whether the eligible charges from the HMSA Contracts and HMAA Contract must be disclosed to the public.

HMAA executed one contract with KCH dated May 1996. This HMAA Contract contains a schedule of eligible charges for inpatient hospital services. This schedule lists the maximum amount that HMAA will pay to KCH for inpatient services and is divided into three categories of eligible charges: hospital room and board; hospital ancillary services; and laboratory, radiology, and diagnostics. According to HMAA, the actual amount that HMAA pays KCH depends on what services were provided, the eligible charges for those services, and the type of benefits package for the HMAA enrollees.

The HMSA Contracts specify the eligible charges from which HMSA calculates its payment to KCH. These eligible charges are listed according to Diagnostic Related Groups (“DRG”).³ A DRG is a three-digit code number which represents a group of services for a particular diagnosis. (Letter to the OIP from HMSA's Legal Services Director, Francie Boland, dated May 13, 1997) (“HMSA's Letter to the OIP”). The Federal government has assigned DRG code numbers to approximately 400 diagnoses. See 61 Fed. Reg. 46266 (1996). The HMSA Contracts do not list all 400 DRGs. Instead, the 1995 HMSA contract lists about 20 different DRGs along with the appropriate HMSA eligible charges; the 1996 HMSA contract lists 50 DRGs along with the appropriate HMSA eligible charges. During a meeting at HMSA on October 30, 1997, an HMSA manager advised the OIP that payment for DRGs that are *not* listed in the contracts is based on a case-by-case calculation. This process of calculation is not detailed in the HMSA Contracts. The HMSA Contracts also contain a mechanism to reimburse KCH for treatments where the costs exceed the norm; these amounts are not covered under the eligible charges. At the October 30, 1997 meeting, the HMSA Manager also informed the OIP that the actual amount that HMSA will pay KCH will depend on the type of

³ The HMSA Contracts refer to its eligible charges as the “DRG Rate.”

DRG, the duration of the enrollee-patient's stay, and the type of HMSA health benefits package for that particular enrollee.

The OIP gave HMSA and HMAA (also collectively referred to as "Submitters") the opportunity to identify and explain whether they considered any information within their respective contracts to be confidential.⁴ HMAA identified the eligible charges within its rate schedule as proprietary financial and commercial information. HMSA similarly identified its eligible charges as confidential business information.⁵

KCH's position regarding disclosure of the HMSA Contracts was provided by HHSC's general counsel, Alice Hall ("HHSC's Counsel").⁶ HHSC's Counsel sent the OIP a letter dated May 15, 1997 which advised, "[w]e (HHSC and KCH) did not deny access (to the HMSA Contracts) because we have an interest in protecting the disclosure of these records but, rather, to honor HMSA's claim that they should not be disclosed pending resolution of the issue by your agency and/or the courts."⁷

⁴ Using HMSA's and HMAA's assertions of confidentiality as a guide, the OIP advised that KCH disclose the "public" parts of the HMSA and HMAA Contracts. The information that the Submitters identified as "confidential" was withheld until the OIP opined regarding whether the material identified fell within any UIPA exception to disclosure, and thus could be withheld from public disclosure. This partial disclosure procedure was followed when Mr. Russi's request included the entire contract and had not yet been narrowed to only the eligible charges.

⁵ HMSA also asserted that how it derives its eligible charges—the information used and the process to calculate the eligible charges—is protected from disclosure. As Mr. Russi's UIPA request was modified and he is now only seeking access to the eligible charges, the OIP need not opine on whether the information within the HMSA Contracts, used to derive the eligible charges, is disclosable to the public. HMSA was advised of Mr. Russi's revised request and was invited to supplement its position statement. As HMSA has not provided the OIP with any supplemental statement regarding public access to the eligible charges, the OIP will rely upon HMSA's May 13, 1997 and September 26, 1997 letters.

⁶ KCH's initial position statement was provided before the request for the HMAA Contract, and therefore, KCH's May 1997 letter does not address KCH's position regarding disclosure of the HMAA Contract.

⁷ The May 15, 1997 letter from HHSC's Counsel further stated that "[i]t is our position now and has always been our position that the issue of whether or not a vendor's proposal or contract contains proprietary information which would not be subject to public disclosure under chapter 92F is a matter for the OIP. . . . We have no position as to whether or not the records fall within an exception to the disclosure provisions."

Mr. Tom Russi
December 30, 2015
Page 6

(Letter to the OIP from HHSC's Counsel dated May 15, 1997). KCH's position statement was supplemented in October 1997 when the OIP notified HHSC's Counsel that Mr. Russi had amended his UIPA request to include the HMAA Contract, but that he was only interested in access to the eligible charges within the HMAA and HMSA Contracts. HHSC's Counsel sent the OIP a memorandum which reiterated KCH's position regarding access:

This will confirm the attached letter sent to you in May (1997) concerning Kona Community Hospital's (KCH) position on the release of these contracts, with the eligible charges, to Mr. Russi. We do not believe that it would frustrate a legitimate government purpose of HHSC or KCH to release the eligible charges to the public.

(See Memorandum to the OIP from HHSC's Counsel dated October 31, 1997, attached at Exhibit A) ("HHSC's Memorandum to the OIP").

DISCUSSION

I. INTRODUCTION

Government records that a state or county agency maintains are subject to the UIPA. As KCH is part of the HHSC, it is a state agency, and therefore KCH's inpatient contracts with healthcare benefits companies, such as HMSA and HMAA, are government records. See Haw. Rev. Stat. § 323F-2(a) (Supp. 1997) and § 92F-3 (1993). Under the UIPA, government records are presumed to be open for public inspection and copying "unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). The five UIPA exceptions to public disclosure are set forth in section 92F-13, Hawaii Revised Statutes.⁸ Based on the facts of this case, section 92F-13(3), Hawaii Revised Statutes, is the only UIPA exception relevant to our inquiry:

⁸ Where the requested government record contains both "public" and "confidential" information, the agency must disclose all information which may be segregated from the nonpublic material. See OIP Op. Ltr. No. 95-13 at 5 (May 8, 1995) ("if a requested record contains both public information and information protected by one of the UIPA's exceptions, an agency must disclose any reasonably segregable portion of the record").

§92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

. . .

- (3) Government 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) (1993).

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose government records if the agency demonstrates that the record must be confidential in order to avoid the frustration of the agency's legitimate government function. See Haw. Rev. Stat. §§ 92F-11(b), 92F-13(3), and 92F-15(c) (1993).

The Hawaii Supreme Court has previously referred to the UIPA's legislative history to determine when confidential commercial information is exempt from disclosure because doing so will result in the frustration of a legitimate government function. See Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 386-90, 846 P.2d 882, 891-892 (1993). The legislative history for section 92F-13(3), Hawaii Revised Statutes, reads in relevant part as follows:

4. A new [s]ection . . . is added to create four categorical exceptions to the general rule [of public access]. Rather than list specific records in this statute, at the risk of being over- or under-inclusive, your Committee prefers to categorize and rely on the developing common law. The common law is ideally suited to the task of balancing competing interest[s] in the gray areas and unanticipated cases, under the guidance of the legislative policy. To assist the Judiciary in understanding the legislative intent, the following examples are provided.

. . .

(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.

. . .

(7) Trade secrets or confidential commercial and financial information;

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1094-95 (1988); see also Kaapu at 388-89, 846 P.2d at 892. Thus, based on the legislative history of section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose confidential commercial or financial information if doing so would frustrate the agency's legitimate government function. Kaapu at 388-89, 846 P.2d at 892; Haw. Rev. Stat. § 92F-13(3) (1993); S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1094-95 (1988); see also OIP Op. Ltr. No. 97-4 (Apr. 22, 1997).

II. CONFIDENTIAL COMMERCIAL AND BUSINESS INFORMATION

In applying the exception to the rule of disclosure for confidential commercial information, the OIP has previously opined that:

for information to be exempt from disclosure under the confidential commercial and financial information exemption of the UIPA, it must meet the definitions of 'confidential' . . . and 'commercial or financial', and then its disclosure must frustrate a legitimate government function. . . .

OIP Op. Ltr. No. 89-5 at 19 (Nov. 20, 1989).

A. Frustration of a Legitimate Government Function

In a letter to the OIP from HMAA's General Counsel, HMAA suggests that disclosure of eligible charges listed in the HMAA Contract weakens KCH's contract negotiating position with healthcare benefits companies (Letter to the OIP from HMAA's General Counsel, Todd Meek, dated August 28, 1997) ("HMAA's Letter to the OIP"). HMAA claims that if KCH's eligible charges are disclosed, all healthcare

Mr. Tom Russi
December 30, 2015
Page 9

benefits companies will know the various tiers of eligible charges that KCH has accepted—including KCH's lowest acceptable price. These healthcare benefits companies could then use the information to negotiate lower eligible payments to KCH, which would result in patients making higher copayments. (HMAA's Letter to the OIP).

Although HMAA raises these frustration arguments on behalf of KCH and HHSC, the federal courts have refused to allow a submitter to make such an argument on a government agency's behalf, particularly where the agency declines to make the argument itself.⁹ Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (where an agency declines to argue that disclosure of information would impair the agency's ability to obtain similar information in the future, the court will not allow the submitter to raise the issue on the agency's behalf). And in Comdisco, Inc. v. GSA, 864 F. Supp. 510 (E.D. Va. 1994), the court deferred to the agency's determination that disclosure of the requested information would not impair the agency's ability to obtain such information in the future. The Comdisco court observed that the agency is in the best situation to determine if disclosure would inhibit future submissions. Id. at 515. Thus, where government wants to disclose the information "it would be nonsense to block disclosure under the purported rationale of protecting government interests." Id.

Moreover, HHSC's Counsel was provided with a copy of HMAA's frustration argument. HHSC took no position regarding the argument and instead asserted that neither KCH's nor HHSC's legitimate government functions would be frustrated if the eligible charges from the HMSA and HMAA Contracts were disclosed. See Exhibit A (HHSC's Memorandum to the OIP). As the agency does not claim that disclosure of the eligible charges from the HMSA and HMAA Contracts frustrates any legitimate government function of KCH or HHSC, the OIP finds that there is no frustration.

As no legitimate government function of KCH or HHSC would be frustrated by disclosure, the eligible charges do not qualify to be withheld under section 92F-

⁹ The legislative history of the UIPA advises that "[t]he common law is ideally suited to the task of balancing competing interest in the gray areas and unanticipated cases[.]" S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093-1094 (1988). In previous opinion letters the OIP has cited federal case law as guidance for interpreting the UIPA. See OIP Op. Ltr. No. 97-4 (Apr. 22, 1997).

13(3), Hawaii Revised Statutes, and therefore the eligible charges must be disclosed. Moreover, the OIP notes that HMSA and HMAA have failed to establish that the eligible charges constitute confidential business information.

B. Confidential Business Information

Although federal law is significantly different regarding disclosure of confidential business information, the OIP has previously referred to the federal law for guidance in determining whether commercial or financial information qualifies as “confidential” under the UIPA. See OIP Op. Ltr. No. 97-4 (Apr. 22, 1997). The federal courts have found commercial and financial information to be “confidential” under the federal Freedom of Information Act (“FOIA”) if the disclosure would either likely (1) impair the government’s future ability to obtain necessary information; or (2) substantially harm the competitive position of the person who provided the information. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (“National Parks”).

Unlike Hawaii’s “frustration” exception, FOIA’s exemption four (“Exemption 4”), permits an agency to withhold “commercial or financial information obtained from a person and privileged or confidential” FOIA’s Exemption 4 specifically provides:

(b) This section [requiring disclosure of information] does not apply to matters that are--

. . . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential

5 U.S.C. § 552(b)(4). Note that under FOIA, once commercial or financial information is found to be confidential or privileged, the agency is not required to disclose it. Under the UIPA, however, Hawaii state and county agencies must go one additional step and show that this confidential commercial or financial information, if disclosed, would also frustrate an agency’s legitimate government function. See Kaapu; Haw. Rev. Stat. § 92F-13(3)(1993); see also OIP Op. Ltr. No. 97-4 at 8 (Apr. 22, 1997) (as disclosure of subcontract costs would frustrate the

state's procurement functions, and as this information is confidential commercial information, these amounts are not required to be disclosed).

1. Impairment of Government's Ability to Obtain Information in the Future

In National Parks, supra, the agency obtained the submitter's financial information pursuant to a federal statute. As the submitter's financial information was required to be provided to government, the court concluded that "there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future." Id. at 770. Accordingly, the court ruled that the financial information requested was not confidential and did not qualify for FOIA protection.

In an extension of National Parks, the district court of the District of Columbia held that disclosing commercial or financial information that is *developed during* the contract negotiations process with the government, as opposed to financial information *submitted* to government by the entity, will not jeopardize the government's ability to obtain similar information in the future. See Comstock International (U.S.A.), Inc. v. Export-Import Bank of the United States, 464 F. Supp. 804, 807 (D.D.C. 1979) (the government's ability to obtain similar information in the future is not impaired where the information within the loan agreement "is not submitted to the government but rather generated by it (the government) through [the entity's] participation in the negotiation process").

In the present case, the Submitters have both stated that they negotiated their respective eligible charges with KCH prior to execution of the contracts. As KCH and the Submitters developed the eligible charge amounts during the contract negotiations process, and this information was not merely given to KCH by HMSA and HMAA, the OIP finds that, like the court in Comstock, it is unlikely that the disclosure of these negotiated eligible charges would impair the agency's ability to obtain similar information in the future. See Comstock, 464 F. Supp. at 807. Accordingly, the OIP believes that HMSA's and HMAA's eligible charges do not meet the "impairment" prong for the confidential status test.

2. Likelihood of Substantial Competitive Harm

Having opined that the Submitters' eligible charges do not meet the "impairment" test for confidential status, the OIP now examines whether disclosure of the eligible charges are confidential under the "substantial competitive harm" test. See OIP Op. Ltr. No. 97-4 at 5-6 (Apr. 22, 1997) (citing National Parks, 498 F.2d at 770).

Federal courts have explained that commercial and financial information is confidential if disclosure would likely cause substantial competitive harm to the competitive position of the submitters of the information. See National Parks, 498 F.2d 765. Although conclusory and generalized allegations of competitive harm are insufficient to prove the likelihood of substantial competitive harm, neither must there be proof of actual competitive harm. GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994). Instead, federal courts have found that a submitter suffers "substantial competitive harm" when the following facts exist: (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm. Id.

a) Actual Competition

HMSA and HMAA both claim to have competitors in the business of providing healthcare benefits. (HMSA's Letter to the OIP) (HMAA's Letter to the OIP). The OIP does not question these representations and will assume for the sake of argument that the facts support the claims that the Submitters face actual competition from each other and other businesses that offer healthcare benefits.

b) Competitive Harm

HMSA claims that information within its contract with KCH is proprietary and confidential commercial information which, if disclosed, will cause substantial competitive harm to HMSA. HMAA similarly asserts that its reimbursement schedules are proprietary business information which, if disclosed, will cause competitive harm to HMAA.

The Submitters were both asked to substantiate their positions that their respective contracts qualify for protection under the UIPA "frustration" exception to disclosure. HMSA and HMAA each provided the OIP with written position statements, both of which asserted that disclosing the eligible charges would cause competitive harm, and therefore the eligible charges should be confidential. The Submitters' position statements, however, provided only conclusory allegations of

how disclosure of the eligible charges would cause competitive harm; neither HMSA nor HMAA offered explanations or evidence of how this outcome would occur. Without evidence or arguments of *how* the substantial competitive harm would occur, the OIP is not persuaded that disclosing the eligible charges for one community hospital would cause the competitive harm which HMSA and HMAA allege.

More specifically, HMSA claims that disclosure of its KCH eligible charges and other data within the HMSA Contracts will reveal HMSA's reimbursement structure. HMSA alleges that it will suffer substantial competitive harm if its reimbursement structure is revealed. (HMSA's Letter to the OIP). After Mr. Russi amended his request, the OIP notified HMSA that only its eligible charges were being sought, and HMSA was given an opportunity to amend its position statement to address this narrowed request. However, HMSA did not claim that disclosure of *only* the eligible charges would reveal HMSA's reimbursement structure. Nor did HMSA provide the OIP with any supplemental explanations or legal authority to support HMSA's claim that disclosure of only the eligible charges for KCH would reveal HMSA's reimbursement structure. Without such claims, arguments, or evidence to support these allegations, the OIP cannot find that disclosing these eligible charges, without other data, would reveal HMSA's reimbursement structure and thus cause substantial competitive harm to HMSA.

HMSA also claims that disclosure of KCH eligible charges, together with HMSA claims statistics, would allow HMSA's competitors to determine the dollar amount HMSA pays for its services and how HMSA develops its rates. (HMSA's Letter to the OIP). HMSA states “[a]ny other plan seeking a competitive position similar to HMSA's would be advantaged by this data in its negotiations with hospitals and in its premium.” (HMSA's Letter to the OIP). HMSA compares the eligible charges and claims statistics to pricing and quantity information that the OIP has previously concluded was confidential. See OIP Op. Ltr. No. 94-14 (Aug. 10, 1994).

HMAA asserts a similar position. HMAA alleges that disclosure of its eligible charges from the HMAA Contract with KCH will allow HMAA's competitors to view proprietary and confidential information that will result in substantial harm to HMAA's competitive position. (HMAA's Letter to the OIP). HMAA also cites to OIP Opinion Letter Number 94-14 for support but does not further articulate how disclosure will cause substantial harm to HMAA.

Mr. Tom Russi
December 30, 2015
Page 14

In OIP Opinion Letter Number 94-14, citing Timken Co. v. United States Custom Service, 531 F. Supp. 194 (D.D.C. 1981), the OIP concluded that disclosing the price and quantity of imported green coffee beans would likely cause substantial competitive harm to the importers. The federal court in Timken found that disclosure of a manufacturer's domestic and export unit prices, quantities sold, the customs duty amount, the pricing practices and policies, and the marketing channels would allow the manufacturer's competitors to selectively underprice it, estimate its profit margins, determine its supply and marketing weaknesses, and exploit those weaknesses. The court therefore determined that release of the manufacturer's detailed financial information would likely cause a substantial competitive harm to the manufacturer's competitive position, and thus this financial information constituted confidential business information that was exempt from disclosure under FOIA's Exemption 4. Timken, 531 F. Supp. at 197. However, Timken is not persuasive in the present case because the facts at hand are distinguishable.

The type of information sought in Timken was highly detailed financial information about the manufacturer's pricing, supply, and marketing information for home and export sales, the disclosure of which would have given competitors the ability to determine and exploit the manufacturer's weaknesses. In the present case, only one type of information is being sought – eligible charges. The eligible charges from KCH contracts only reveal the maximum amount that HMSA and HMAA may possibly pay to KCH for each diagnosis. The total amount that HMSA and HMAA actually pay to KCH may depend on other variables, such as the types of services provided to the patient, the patient's length of stay, and the type of benefits package that covers the patient. Unlike the facts in Timken, the OIP believes that disclosing KCH's eligible charges would not, in and of itself, give HMSA's and HMAA's competitors the kind of information needed to exploit HMSA's and HMAA's weaknesses; thus disclosure of the eligible charges would not likely cause substantial competitive harm to HMSA's and HMAA's competitive positions in the healthcare benefits market. Further, because the Submitters did not explain how disclosure of their eligible charges from KCH contracts would allow competitors to undercut or otherwise gain a competitive advantage, the OIP does not have sufficient information to determine that the disclosure of the KCH eligible charges, alone, will cause substantial competitive harm to HMSA or HMAA.

This approach is consistent with that of the federal court of the District of Columbia. See Racal-Milgo Gov. Systems v. Small Business Administration, 559 F. Supp. 4, 6 (D.D.C. 1981). In Racal-Milgo the court held that pricing information, alone, was not exempt from public disclosure under FOIA because the record did not indicate *how* revealing the prices government paid for computers would likely cause substantial competitive harm to the seller. Id. at 6. In this case, the court recognized the public policy underlying disclosure of pricing information:

The Freedom of Information Act was intended to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. . . . Adequate information enables the public to evaluate the wisdom and efficiency of federal programs and expenditures.

Id. (citations omitted).

In the present case, as in Racal-Milgo, only one type of information is sought—the eligible charges for KCH. Additionally, as was the case in Racal-Milgo, the Submitters’ position statements do not indicate how disclosure of their eligible charges would likely cause substantial competitive harm to them. Therefore, following the Racal-Milgo reasoning, the OIP concludes that disclosure of the HMSA and HMAA eligible charges will not cause substantial competitive harm to the Submitters.¹⁰

HMAA also claims that its eligible charges are used to actuarially determine its business rate premiums. HMAA states that because hospital costs are a substantial component of the premium calculation function, disclosing KCH eligible charges would give HMAA's competitors “invaluable insight to the HMAA cost of doing business.” (HMAA's Letter to the OIP). HMAA, however, did not explain how disclosing the eligible charges reveals HMAA’s cost of doing business.

¹⁰ During the October 30, 1997 informational meeting at HMSA, HMSA representatives advised the OIP that disclosing the eligible charges would weaken HMSA’s bargaining position with other hospitals. HMSA claimed that hospitals it does business with could use KCH’s eligible charges as leverage to negotiate better reimbursement arrangements for themselves. HMSA was invited to support this claim in writing with facts and legal arguments but did not do so. Without written support for HMSA’s oral assertions, the OIP is unable to further consider this allegation.

Finally, HMAA claims that its eligible charges should be considered exempt “work papers” for purposes of rate determination and cited to OIP Opinion Letter Number 91-29 in which the OIP concluded that “work papers” qualified for protection under the “frustration” exception. See OIP Op. Ltr. No. 91-29 (Dec. 23, 1991). In that opinion letter the Matson Navigation Company (“Matson”) applied for a general rate increase with the Federal Maritime Commission and was required to support its filing with, among other things, “work papers” that contained Matson’s underlying financial and operating data. Id. Those work papers consisted of a company-wide balance sheet and income statement, actual and projected rate-of-return exhibits, detailed investment and depreciation information, a working capital schedule, an inventory of property and equipment, a detailed listing of general and administrative expenses, and other similar types of exhibits. Id. at 7. The OIP concluded that disclosing such comprehensive and detailed financial information would likely cause substantial harm to Matson’s competitive position. Id.

Opinion Letter Number 91-29 is factually distinct from HMAA’s situation. Matson was required to support its filing for a general rate increase with specific and detailed financial and operating expense data. The work papers contained the very type of detailed comprehensive information which would assist the Federal Maritime Commission in deciding whether to grant Matson’s request for a general rate increase, i.e., Matson’s actual cost of doing business. In HMAA’s case, however, detailed financial and operating expense information of the type which would directly reveal HMAA’s cost of doing business is not being sought. Although HMAA claims that hospital costs are a “substantial component” of HMAA’s cost of doing business, revealing the KCH eligible charges does not reveal HMAA’s *total* hospital costs because, as HMAA states, its eligible charges are negotiated and thus these amounts may differ from hospital to hospital and from year to year. Moreover, disclosure of KCH’s eligible charges, in and of themselves, will not reveal HMAA’s total hospital costs which are based on several variables. Therefore, the OIP believes that HMAA’s competitors will be unable to determine its cost of doing business from disclosure of the KCH eligible charge amounts alone.

Furthermore, a Fourth Circuit court has recognized that the existence of unknown variables may actually prevent competitors from calculating profits from unit price information. In Acumenics Research & Technology v. Dep’t of Justice, 843 F.2d 800 (4th Cir. 1988) the federal court recognized that unit prices were not confidential under FOIA’s Exemption 4 because disclosing these prices would not

allow competitors to derive the submitter's profit strategy. The court found that "many variables not readily known to the submitter's competitors prevented use of the unit pricing information to derive the submitter's multiplier or pricing strategy" which would reveal the submitter's profit margin. *Id.* at 803. Because disclosing unit prices would not reveal the submitter's profit margin, the court held that disclosure would not cause substantial competitive harm to the submitter. *Id.* In HMAA's case, even if its *total* hospital costs were revealed within KCH's eligible charges, many other variables that contribute to HMAA's cost of doing business are unknown; for example, the number of HMAA enrollees treated, the service provider, the location of treatment, and the type and duration of treatment provided. Given the existence of numerous unknown variables, the OIP is not persuaded that disclosure of KCH eligible charges, alone, would enable HMAA's competitors to calculate HMAA's cost of doing business.

While the OIP does recognize that disclosing the eligible charges might increase competition among HMSA, HMAA, and their competitors, the UIPA only protects information which, if disclosed, would likely cause *substantial* competitive harm. As HMSA and HMAA have failed to establish that disclosing the eligible charges within the HMAA Contract and the HMSA Contracts would likely cause them substantial competitive harm, the eligible charges do not constitute confidential business information.

Therefore, as the eligible charges from the HMSA and HMAA contracts are not confidential business information, and disclosure of these eligible charges would not frustrate KCH or HHSC's legitimate government functions, the OIP concludes that the eligible charges from the HMSA Contracts and HMAA Contract are not exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes, and must therefore be disclosed to the public.¹¹

CONCLUSION

¹¹ While KCH does not assert section 92F-13(4), Hawaii Revised Statutes, as a reason for nondisclosure, the OIP notes that section 323F-6, Hawaii Revised Statutes, discusses KCH's and HHSC's duty to disclose information concerning rates and charges at certain times. Haw. Rev. Stat. § 323F-6 (Supp. 1997). However, because this provision only affects disclosure of rates during the procurement process, which is not the case here, section 323F-6, Hawaii Revised Statutes, does not apply to protect the eligible charges from disclosure. *See* Haw. Rev. Stat. § 92F-13(4) (1993) (agency not required to disclose government records which, pursuant to state or federal law, are protected from disclosure).

Mr. Tom Russi
December 30, 2015
Page 18

Disclosure of the eligible charges within the HMSA and HMAA Contracts would not impair KCH's or HHSC's ability to obtain similar information in the future, nor would disclosure of this information likely cause a substantial competitive harm to HMSA's and HMAA's competitive positions. Furthermore, disclosure of these eligible charges would not frustrate KCH's or HHSC's legitimate government functions. Accordingly, the OIP concludes that the eligible charges within the HMSA Contracts and the HMAA Contract do not fall under the "frustration" exception of the UIPA. Haw. Rev. Stat. §92F-13(3) (1993). As no exception to disclosure applies, the OIP finds that the eligible charges within KCH's contracts with HMSA and HMAA must be publicly disclosed.

Very truly yours,

Jennifer M.L. Chock
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

JMLC:pm

Attachment

cc: Alice M. Hall
Thomas M. Driskill, Jr.
Hawaii Health Systems Corporation