August 27, 2002

The Honorable Leonard Agor
Director
Department of Labor and Industrial Relations
Keelikolani Building
830 Punchbowl Street
Honolulu, Hawaii 96813

Re: Schedule of Maximum Allowable Medical Fees

Dear Mr. Agor:

This is in response to former Department of Labor and Industrial Relations ("DLIR") Director, Lorraine Akiba's request for an opinion on the above-referenced matter.

## ISSUE PRESENTED

Whether schedules of maximum allowable medical fees ("Fee Schedules"), that are required by statute to be submitted to the DLIR by health care plan contractors ("Contractors"), may be withheld from public disclosure.

## BRIEF ANSWER

Yes. Section 92F-13(3), Hawaii Revised Statutes, states that government agencies need not disclose records, which, if disclosed, would cause the frustration of a legitimate government function. The DLIR has shown that its statutory requirement of making determinations of charges and adopting fee schedules for injuries covered by workers' compensation laws, would be frustrated if it was required to disclose Fee Schedules publicly. Therefore, the DLIR has the discretion to withhold Fee Schedules from disclosure under section 92F-13(3), Hawaii Revised Statutes.

## FACTS

In a letter to the OIP dated August 17, 1995, Ms. Akiba advised that, upon request by the DLIR's Director, Contractors are required under Act 234, Session

Laws of Hawaii 1995[1], to submit schedules of maximum allowable medical fees. These Fee Schedules are used by the DLIR as the primary guideline in establishing the prevalent charges for the workers' compensation medical fees schedule, which the DLIR is required by law to set. Ms. Akiba advised the Fee Schedules may be "proprietary and therefore confidential."

Mr. Gary Hamada, Administrator for the DLIR Disability Compensation Division, advised the OIP in a letter dated January 13, 1998, that Contractors have expressed concerns that the Fee Schedules may become public records once submitted to the DLIR.

Ms. Akiba provided as evidence of the proprietary nature of Fee Schedules, a letter written by her to Contractors dated April 29, 1998, along with attachments. In her letter of April 29, 1998, Ms. Akiba stated that she, as Director of the DLIR, requested Contractors to submit their Fee Schedules. Three Contractors contacted DLIR with concerns about confidentiality. Of these three, one provided the information with the request that it not be made public, one declined to provide the information on the basis that it is confidential, and one had not responded as of the date of Ms. Akiba's letter. Ms. Akiba also advised the OIP that she told Contractors that she would not disclose information from Fee Schedules pending this opinion.[2]

As attachments to her letter of April 29, 1998, Ms. Akiba provided copies of two letters from Contractors. A letter dated April 7, 1998, from Mr. R. Roy Mizushima, Director of the Statistics Department for Hawaii Medical Services Association ("HMSA"), to the DLIR advised that HMSA would submit its Fees Schedules. Mr. Mizushima's letter also stated:

> **The information provided is confidential commercial and financial information within the meaning of Hawaii Revised Statutes Section 92F-13(3) belonging to HMSA and we ask that the information not be disclosed.** The information used to develop

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[1] Act 234, Session Laws Hawaii 1995, was codified at section 386-21.5, Hawaii Revised Statutes.

[2] Prior to the adoption of the OIP's administrative rules entitled "Agency Procedures and Fees for Processing Government Record Requests" on February 26, 1999, agencies had no specific time limits to respond to freedom of information requests for records. Before the OIP's rules were adopted, if the public nature of a record was not certain, agencies often told requesters they would not disclose until the OIP issued an opinion on the matter. The OIP's rules established a ten business day time limit to respond to formal record requests. Haw. Admin. R. 2-71-13 (1999). In light of this time limit, the OIP notes that agencies *must* make a decision to disclose or not to disclose a record within ten business days, and must inform the requester of this decision, regardless of whether a request for an OIP opinion is pending.

> the formulas and the resulting rates for the Schedules are unique to HMSA. The Schedules are based on years of claims data HMSA has collected and on which HMSA has expended substantial resources to organize and analyze the data to create the Schedules. HMSA would be harmed if disclosure were made of the Schedules. Competing health plans, like HMSA, negotiate with physicians, hospitals, and other providers of medical services for contracted rates. If the rates and the formula developed by HMSA to arrive at the rates are disclosed, all other plans with which HMSA competes would have information about the dollar amount HMSA pays for services and how HMSA develops its rates.

(emphasis in original).

In a letter to the DLIR dated April 16, 1998, Ms. Loraine Bosanko, Senior Vice President of Health Services for Hawaii Management Alliance Association ("HMAA"), advised as follows:

> We respectfully decline to submit HMAA's *Schedule of Maximum Allowable Medical Fees* based on the fact that the information contained in these schedules is proprietary as there are individual signed contracts with the various individuals and/or corporations and therefore an explicit agreement of confidentiality exists.

In 1998, the OIP issued Opinion Letter Number 98-02, which sets forth a test as to when the information of private entities that is maintained by government agencies as part of a contract, is protected from public disclosure under section 92F-13(3), Hawaii Revised Statutes. After publication of the OIP Opinion Letter Number 98-02, which was subsequent to the DLIR's request for this opinion, the OIP sought clarification from the DLIR on whether any legitimate government function would be frustrated by disclosure of Fee Schedules. Ms. Akiba, in a letter dated January 6, 2000, advised that the DLIR has no evidence of legitimate government functions that will be frustrated if Fee Schedules must be made public. She also noted that health care plan contractors have made generalized allegations of competitive harm if their Fee Schedules are made public.

You advised the OIP, in a letter dated March 5, 2002, that the DLIR experienced difficulty in obtaining responses to the 1998 medical fee survey because of confidentiality concerns as expressed in Ms. Akiba's April 29, 1998, letter. Your letter also noted that although Contractors are required to provide the DLIR with Fee Schedules, there are no provisions in chapter 386, Hawaii Revised Statutes, to

enforce submittal of the data. In 1998, one Contractor did not submit any data, and another responded one year after the initial request, which resulted in "dated" information to update the medical fee schedule. You also advised that the DLIR anticipated continued problems of non-response if it is not able to guarantee to Contractors confidentiality of their commercial and financial information. Contrary to the statement in Ms. Akiba's January 8, 2000, letter, you advised that non-response and outdated data compromise the validity of the DLIR's survey, which would frustrate one of DLIR's legitimate government functions. For these reasons, you asked that the information submitted by Contractors be deemed exempt from public disclosure.

In a telephone conversation with the OIP on March 7, 2002, Ms. Elienne Yoshida of DLIR's Research and Statistics Office advised that only 15 entities in Hawaii are required by law to submit Fee Schedules to the DLIR. Non-submittal or late submittal by even one Contractor would skew the results of the DLIR's survey, especially if the non-submitter or late submitter is one of the larger Contractors, because the pool of Contractors is so small. In addition, Ms. Yoshida advised, in a telephone conversation of July 22, 2002, that once the survey is completed, the Fee Schedules are kept by the DLIR for reference.

The Auditor for the State of Hawaii issued a report to the Governor and the Legislature dated March 2002, entitled "Management Audit of the Disability Compensation Division and a Study of the Correlation Between Medical Access and Reimbursement Rates Under the Medical Fee Schedule" ("Auditor's Report"). The Auditor's Report discussed, in part, the DLIR's problems in obtaining Fee Schedules:

> the lack of cooperation from medical practitioners and health plan providers to provide cost information adversely impacted the [DCD]'s ability to collect necessary data to make adjustments to the fee schedule. . . .
>
> the research manager also encounters obstacles in obtaining critical information from medical service providers. Health care plan contractors and health care providers are reluctant to release data on costs and fees of services they provide. They claim that the data is proprietary and express concerns over the potential for price fixing. . . .

Auditor's Report at pages 44-45.

The Auditor's Report made the following recommendations to the DLIR's Director to improve the amendment process for the workers' compensation medical fee schedule that pertain to the issues herein:

> 1. Allocate sufficient resources to conduct research on workers' compensation issues and ensure that statistically valid surveys, as required by section 386-21(c), HRS, are completed;
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> . . .
>
> 3. implement mechanisms to mandate the provision of necessary information by health care providers to complete the statistically valid surveys required by Section 386-21(c). . .

Auditor's Report at page 45.

A letter from you dated February 28, 2002, to the State Auditor was attached to the Auditor's Report as Attachment 2, and stated, in relevant part:

> The Research office will access availability of resources and will take steps necessary to adequately support [workers' compensation medical fee schedule] activities. . . . While section 386-21.5 requires health care plans to provide the director with maximum allowable medical fee information, we agree that additional measures must be developed to force compliance with this requirement. The DLIR will continue to educate and work with the Hawaii Medical Association and other health care provider organizations on the process and requirements necessary to obtain medical fee schedule adjustments.

## DISCUSSION

### I. THE UIPA

The Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), governs disclosure of all Hawaii State and county government agency records. The term "government record" includes information, such as Fee Schedules, that is "maintained by an agency." Haw. Rev. Stat. § 92F-3 (1993). The UIPA operates on the presumption that all records are public unless an exception at section 92F-13, Hawaii Revised Statutes, applies. Haw. Rev. Stat. § 92F-11 (1993).

For purposes of this opinion, the OIP only discusses the exception to disclosure at section 92F-13(3), Hawaii Revised Statutes, which states that agencies need not disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" ("Frustration Exception").

## II. BACKGROUND OF THE FRUSTRATION EXCEPTION

The UIPA is based in large part on recommendations of the Governor's Committee on Public Records and Privacy ("Governor's Committee"). The OIP therefore consults the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report") for guidance when appropriate. The Governor's Committee Report discusses the Frustration Exception, and lists some types of records or information that may fall into this exception:

> One area which is not explicitly covered by current law is the area of **trade secrets and proprietary information**. This material is protected under federal law as well as under judicial rules of evidence but in agency practice, its protection is less well-established.
>
> There is no dispute that this material is entitled to protection. In fact, a strong argument can be made that if agencies require such information to be submitted, then agencies have a legal obligation to protect that information. The failure to do so might even be considered a "taking" of property under the Fifth Amendment and compensable. [citation to testimony omitted].
>
> There are, however, two aspects of the trade secret area that deserve special attention. First, as one of the Committee members noted, this area needs to be defined explicitly and carefully. Trade secrets should not just become a term for everything a business doesn't want public. The term has been defined by judicial decisions and it should not be difficult to define this area for Hawaii. The major concepts seem to be a pattern, recipe, formula, process, device, or compilation of information which is used in business and which provides a competitive advantage. . . .

Vol. I Governor's Committee Report 122 (1987) (emphasis in original).

The Governor's Committee recommended that much of the law that ultimately became the UIPA be based on the Uniform Information Practices Code ("Model Code"). The Model Code protects from public disclosure:

> Trade secrets or confidential commercial and financial information obtained, upon request, from a person; . . .

Uniform Information Practices Code § 2-103 (a) (9) (Nat'l Conf. Of Commissioners on Uniform State Laws (1980).[3]

The OIP also looks to the Legislative history of the Frustration Exception for guidance on what this exception encompasses:

> To assist the Judiciary in understanding the legislative intent, the following examples are provided:
>
> . . .

[3] The following commentary to section 2-103(a)(9) of the Model Code cites, *inter alia*, to National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), which is discussed later in this Opinion, and is the leading federal case in this area:

> Many agencies in the exercise of regulatory powers must have access to confidential information from the businesses they regulate. The purpose of subsection (a)(9) is to enable an agency to protect the confidentiality expectation of those submitting information. This exemption is fundamental to freedom of information legislation, [citations omitted]. This subsection actually consists of two analytically separate parts: (1) trade secrets as determined by reference to state law and (2) information that is (a) commercial or financial, (b) confidential and (c) obtained from a person. [citation omitted]. All three elements of the second component must be present for the exemption to apply. This means that the agency must have obtained commercial or financial information from a non-governmental source [citation omitted], *and* the information must be confidential. Material has been held to be confidential if: (1) it would not customarily be released to the public by the person from whom it was obtained, [citation omitted]; (2) disclosure would impair an agency's ability to obtain similar information in the future, *National Parks & Conservation Association v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974); or (3) disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained, [citation omitted].

Uniform Information Practices Code commentary to § 2-103 (a) (9) (Nat'l Conf. Of Commissioners on Uniform State Laws (1980) (emphasis in original).

> (b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.
>
> . . .
>
> (6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information owned by an agency or entrusted to it;
>
> (7) Trade secrets or confidential commercial and financial information. . . .

Sen. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess.

Based on the Legislative history of the Frustration Exception, including the Governor's Committee Report, and the Model Code, the OIP concludes it is appropriate for agencies to invoke the Frustration Exception to protect trade secrets, proprietary information, confidential commercial and financial information ("confidential business information" or "CBI"), *if disclosure would frustrate a legitimate government function.*

## III. WHAT IS "CONFIDENTIAL BUSINESS INFORMATION?"

There is little Hawaii case law discussing the application of the Frustration Exception to CBI type information. Therefore, although the federal Freedom of Information Act ("FOIA") is different regarding disclosure of confidential business information, the OIP has adopted parts of the federal test. See OIP Op. Ltr. No. 98-2 (Apr. 24, 1998). One of the criteria used by federal courts is to treat business information as "confidential" under FOIA's exemption four ("Exemption 4")[4] if

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[4] FOIA's Exemption 4 is similar to the Model Code upon which the UIPA was based, stating:

> (b) This section [requiring disclosure of information] does not apply to matters that are--
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> . . .
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> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

disclosure would substantially harm the competitive position of the person who provided the information. OIP Op. Ltr. No. 98-2 (Apr. 24, 1998) (citing National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) ("National Parks I")[5] (emphasis added)).[6]

**A. Likelihood of Substantial Competitive Harm**

Federal courts have explained that Exemption 4 may be invoked for the benefit of the person who has submitted commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to the competitive position of the submitter. National Parks I at 770. 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) (citations omitted). Instead, federal courts have found that a submitter suffers "substantial competitive harm" when the following exists: (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm. Id.

1) Actual Competition

HMSA represented to the DLIR that it has competitors, and that if its Fee Schedules were disclosed, competitors would have access to information about dollar amounts paid for services and how these rates are developed, which is based on years of claims data being collected and analyzed by HMSA.

2) Competitive Harm

HMSA claims that its Fee Schedules are confidential commercial and financial information, because the information used to develop the formulas, and the resulting rates for the Fee Schedules, are unique to HMSA. HMSA's Fee

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5 U.S.C. § 552(b)(4).

[5] National Parks I is the most cited federal case in this area of law, and has become "known to and acquiesced in by Congress." GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1113 n4 (9th Cir. 1994) (citations omitted).

[6] "National Parks" was actually a series of published cases. The last appellate court case published, National Parks & Conservation Ass'n v. Kleppe, 178 U.S. App. D.C. 376; 547 F. 2d 573 (D.C. Cir. 1974), is referred to in the federal courts as "National Parks II."

Schedules are based on years of claims data HMSA collected. HMSA claims it expended substantial resources to organize and analyze the data to create the Fee Schedules. HMSA also claims it would be harmed if Fee Schedules were disclosed, because all other competing plans would have information about the dollar amount HMSA pays for services and how HMSA develops its rates.

HMAA asserts that the information contained in its Fee Schedules is proprietary as there are individual signed contracts with the various individuals and/or corporations and therefore an explicit agreement of confidentiality exists. The OIP has not been advised what relevance these contracts have to Fee Schedules.

The OIP notes that providers of medical services are greatly affected by workers' compensation schedules of fees. Providers might request access to data submitted to the DLIR by Contractors to verify that the charges are reasonable. If the information contained in Fee Schedules contains CBI, public disclosure could harm the smaller Contractors in particular if the larger ones are then able to corner the market. Thus, the OIP recognizes the competing interests of providers in obtaining Fee Schedule information and of Contractors in preventing their public disclosure. The OIP suggests that the DLIR consider asking the Legislature for guidance on which is the greater interest, and whether some balance can be forged between the two.

3. Contractors Have Not Proven CBI in this Instance

One of the few Hawaii cases discussing CBI, Kekoa D. Kaapu v. Aloha Tower Dev't Corp., 74 Haw. 365, 368-9 (1993) ("Kaapu"), cited to the Legislative history of the Frustration Exception quoted above in section II., in support of its holding that development proposals were protected under the Frustration Exception:

> Public disclosure of development proposals – involving proprietary and other confidential information, such as trade secrets and confidential commercial and financial data – prior to final negotiation of a long-term lease could foreseeably give an unfair competitive advantage to other developers in the event negotiations were to break down. Concern over this risk could cause developers to offer up deliberately vague plans or decline to submit development proposals altogether.

Id. at 389-90.

In the OIP Opinion Letter Number 94-14, citing Timken Co. v. United States Custom Service, 531 F. Supp. 194 (D.D.C. 1981) ("Timken"), the OIP concluded that disclosing the price and quantity of imported green coffee beans would likely cause substantial competitive harm to importers. The 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 disclosure of the manufacturer's detailed financial information would likely cause substantial competitive harm to the manufacturer's competitive position, and thus the financial information constituted confidential business information exempt from disclosure under Exemption 4. Timken at 197.

The type of information sought in Kaapu and Timken was shown to be highly detailed financial information, the disclosure of which would have given competitors an unfair business advantage. In the present case, the information provided by HMAA is not of much help. HMSA provided a more detailed explanation of how Fee Schedules are compiled and used by Contractors, and how this information would be damaging in the hands of competitors. However, the UIPA only protects information which, if disclosed, would likely cause *substantial* competitive harm. It is not conclusive, from the facts presented, that disclosure of Fee Schedules would likely cause substantial competitive harm to Contractors. The OIP declines, therefore, to make a determination as to whether Fee Schedules are CBI without further evidence.

## IV. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Despite the fact that Fee Schedules have not been established as trade secrets or proprietary information that constitutes CBI in this instance, the DLIR may nonetheless withhold disclosure of Fee Schedules if it can show that one or more of its legitimate government functions would be frustrated by disclosure.

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

National Parks I noted that Congress sought to serve two interests when it enacted Exemption 4:

> that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy. The

> "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired. . . . Apart from encouraging cooperation with the Government by persons having information useful to officials, section 552(b)(4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.

National Parks I, at 767-768. The court went on to recognize a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government, and (2) **protecting the rights of those who must.** Id. at 769.

1) Information Voluntarily Submitted to Agency

The OIP Opinion Letter Number 98-02 sets forth the OIP's analysis under the Frustration Exception of how generally to treat information submitted to an agency. That Opinion did not, however, distinguish between information voluntarily submitted to an agency versus information required to be submitted. Since Contractors are legally required to submit Fee Schedules to the DLIR, the OIP does not discuss voluntary submittals in this Opinion.

2) Rebuttable Presumption of No Frustration When Information Required to be Submitted to the Government

In National Parks I, 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 stated that "there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future." National Parks I at 770.

The same court that decided National Parks I later clarified that "whether disclosure is mandatory is certainly a factor in deciding whether the government's access to information is likely to be impaired. If the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment." Washington Post Company v. Department of Health and Human Services, 223 U.S. App. D.C. 139; 690 F. 2d 252,

268; (1982) (*reversed and remanded twice on other grounds)* ("Washington Post"). In a footnote, the Washington Post court referred to a case that distinguished National Parks I, stating "it would be 'unrealistic' to assume that a statutory obligation to provide the government with information guarantees that information will in fact be provided, at least 'when the Government lacks the means to compel strict enforcement.'" Washington Post at 268 fn. 53 *citing* Green v. Department of Commerce, 468 F. Supp. 691, 693 (D.D.C. 1979) *app. dismissed*, 199 U.S. App. D.C. 352, 618 F. 2d 836 (D.C. Cir. 1980).

The Washington Post court also noted, however, that a minor impairment of the government's ability to obtain information in the future cannot overcome FOIA's disclosure mandates; and posed the question as whether the impairment is significant enough to justify withholding the information. Id. at 269 (citation omitted).

The same court later reexamined the National Parks I test in Critical Mass Energy Project v. Nuclear Regulatory Commission, 298 U.S. App. D.C. 8; 975 F.2d 871 (1992) ("Critical Mass"). The court decided not to overrule the National Parks I precedent, but to "correct some misunderstandings as to its scope and application." Critical Mass at 14. Citing to its decision in Washington Post, the court stated that while National Parks I indicated that a governmental interest is unlikely to be implicated where submittal of information is required, there are circumstances when disclosure would affect reliability of such data. Critical Mass at 23. Thus, the court reasoned that when dealing with a FOIA request for information that was required to be submitted to the agency, "the governmental impact inquiry will focus on the possible effect of disclosure on its quality." Id. Further, "when information is obtained under duress, the Government's interest is in ensuring its continued reliability." Id. at 24.

Thus, where it can be established that, although a law requires submittal of information to an agency, the information submitted may be unreliable, or the agency may be unable to compel disclosure in a timely manner, the presumption that the Frustration Exception is inapplicable may be rebutted.

3) Frustration of DLIR's Government Function

Hawaii's Workers' Compensation law provides, at section 386-21(c), Hawaii Revised Statutes:

> (c) The liability of the employer for medical care, services, and supplies shall be limited to the charges computed as set forth at this

> section. The [DLIR's] director shall make determinations of the charges and adopt fee schedules based upon those determinations.

Haw. Rev. Stat. § 386-21(c) (Supp. 2001).[7]

Section 386-21.5, Hawaii Revised Statutes, requires Contractors to provide Fee Schedules to the DLIR, and requires the DLIR to use these to establish prevalent charges:

> (a) A prepaid health care plan contractor as defined in section 393-3 shall provide the director upon request with a schedule of all the maximum allowable medical fees.
>
> (b) Pursuant to section 386-21(c), the director shall review and, to the extent possible, shall use the fee obtained under subsection (a) as the primary guideline in establishing prevalent charges for medical care, services, and supplies in adopting the fee schedule for workers' compensation claims.

Haw. Rev. Stat. § 386-21.5(b) (Supp. 2001).[8]

Despite this statutory requirement, the DLIR provided evidence that Contractors have refused to submit Fee Schedules or submitted them too late to be included in survey compilations. The evidence is clear that Contractors are concerned that the information will become public. For example, HMAA's letter to DLIR indicated its refusal to submit Fee Schedules because it asserts they are

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[7] Mr. Hamada advised, in a telephone conversation of July 30, 2002, that the DLIR has not adopted administrative rules to implement the sections of chapter 386, Hawaii Revised Statutes, that pertain to Fee Schedules.

[8] The Hawaii Prepaid Healthcare Act defines a "prepaid health care plan contractor" as:

> (A) Any medical group or organization which undertakes under a prepaid health care plan to provide health care; or
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> (B) Any nonprofit organization which undertakes under a prepaid health care plan to defray or reimburse in whole or in part the expenses of health care; or
>
> (C) Any insurer who undertakes under a prepaid health care plan to defray or reimburse in whole or in part the expenses of health care.

Haw. Rev. Stat. § 393-3(7) (1993).

proprietary in nature. HMSA agreed to submit its Fee Schedules, but also provided an explanation on how these fees are calculated, and asserted that public disclosure would cause competitive harm. A third Contractor submitted its Fee Schedule a year after the DLIR requested it, after the survey had been completed.

The DLIR advised that because there are only 15 total Contractors who are required by law to submit Fee Schedules, late submittals or non-submittals compromise the validity of the DLIR's survey, which in turn results in frustration of the DLIR's legitimate government functions set forth in chapter 386, Hawaii Revised Statutes. Further, the DLIR alleges that it has no power under chapter 386, Hawaii Revised Statutes, to force Contractors to comply with the statutory requirement of submitting Fee Schedules.[9]

The OIP concludes that because the DLIR is not able to compel timely submittal of Fee Schedules, it has rebutted the presumption that, because the Fee Schedules are required by law to be submitted, the DLIR would suffer no frustration of its government function if Fee Schedules are disclosed. The OIP therefore finds from the facts presented that disclosure of the Fee Schedules would impair the DLIR's ability to timely obtain similar information in the future. The statements and actions of Contractors show that the DLIR has had problems obtaining accurate, timely Fee Schedules in the past, which in turn affected the results of the DLIR's last survey. The incomplete submittal of information frustrates the DLIR's legal mandate to establish prevalent charges. The OIP therefore opines that Fee Schedules may be withheld from disclosure under section 92F-13(3), Hawaii Revised Statutes.

When submittal of information to an agency is required by law, the Frustration Exception appears to allow entities to break the law, thus forcing agencies to invoke the Frustration Exception. The OIP does not condone nor support the Contractors' violation of legal mandates to submit Fee Schedules unless the DLIR deems the records confidential. It would be absurd to conclude that the UIPA and other public record laws such as FOIA were meant to encourage such law violations in order to keep information from the public. The OIP therefore comes to the conclusions reached herein only after much consideration of the issues. The

[9] The DLIR may wish to consult with the Department of the Attorney General on bringing legal action against those Contractors who refuse to submit information they are required by law to submit under section 371-3, Hawaii Revised Statutes. Ms. Yoshida indicated, however, that legal action may not be timely enough to allow her to complete the Fee Schedules surveys by the deadlines. Another option is for the DLIR to approach the Legislature with language that would give the DLIR enforcement power, such as the ability to impose fines or other sanctions.

OIP emphasizes that the conclusions reached in this opinion are narrow, apply only to Fee Schedules submitted to the DLIR, and are not meant to encourage private entities to break the law.

### B. Withholding Information to Protect a Governmental Interest in Administrative Effectiveness

Protecting a governmental interest in effectiveness is an element of the federal test that has not previously been discussed by the OIP, and was only referred to in National Parks I in a footnote:

> We express no opinion as to whether other governmental interests are embodied in this exemption [4 of FOIA]. *Cf. 1963 Hearings* at 200 where the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption.

National Parks I at 770 fn 17.

The court in Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19 (2000) ("Judicial Watch"), stated that when the government requires information to be submitted by a private party as a condition of doing business with the government, the information is "confidential or privileged" under Exemption 4 if one of several conditions are met:

> 1) disclosure which is likely to cause substantial harm to the competitive position of the person from whom the information was obtained, 2) disclosure which would make it difficult for the government to obtain reliable information in the future, and 3) ***withholding the information to protect a governmental interest in administrative efficiency and effectiveness.***

Judicial Watch, at 28-29 (emphasis added) (citations omitted).[10] The Judicial Watch court found that Export-Import Bank, a federal agency, could withhold information requested because disclosure would impair its ability to fulfill its statutory purpose of fostering domestic economic growth by supporting U.S. export

[10] While other cases had not heretofore set forth other elements that could qualify for Exemption 4 protection, the court did note that they could exist. See Washington Post, at 327; Critical Mass, at 286.

transactions that are too risky for private capital financing. Id. at 30. The court noted that:

> The government has a compelling interest in ensuring that the information it takes is of the highest quality and reliability, and disclosure of potentially sensitive commercial and financial information would jeopardize the Bank's ability to rely on any such decisions regarding the viability of future export insurance transactions, thereby hindering the Bank's fulfillment of its statutory purpose.

Id. at 33-34.

The court in Judicial Watch cited to Comstock International, Inc. v. Export-Import Bank, 464 F. Supp. 804 (1979) ("Comstock") in which the requester sought documents pertaining to an international bank loan. The same court again found that commercial banks and borrowers were reluctant to negotiate loan agreements with Import-Export Bank absent assurances of confidentiality; therefore, disclosure would interfere with the ability to promote U.S. exports. Comstock at 808. The Comstock court noted that in National Parks I, it expressly left open the possibility that other governmental interests, such as the interest in program effectiveness, are embodied by FOIA's Exemption 4. Id.

In a very recent case, Public Citizen Health Research Group v. National Institutes of Health, 2002 U.S. Dist. LEXIS 00-1847 (2002) ("Public Citizen), the same court that decided National Parks I found that the effectiveness of the agency's licensing program, which is required by federal statute, would be seriously deterred by the disclosure of royalty information. Public Citizen at 39.

The OIP adopts the federal test for administrative effectiveness as appropriate for an agency's invocation of the Frustration Exception. The OIP declines to include the term "efficiency" at this time, however, as the phrase "administrative efficiency" may be overboard and may encourage invoking of the Frustration Exception in inappropriate situations.

The OIP opines that protecting the DLIR's governmental interest in administrative effectiveness is satisfied by the facts presented. The DLIR's interest in administrative effectiveness would be frustrated if it was unable to obtain accurate and timely Fee Schedules from Contractors. The Frustration Exception therefore allows the DLIR to withhold disclosure of Fee Schedules.

## CONCLUSION

Fee Schedules may be withheld from disclosure under section 92F-13(3), Hawaii Revised Statutes. Disclosure of Fee Schedules would frustrate the DLIR's legitimate government function of adopting the prevalent charges for workers' compensation claims, as the DLIR would be not be able to obtain Fee Schedules in the future. In addition, disclosure would impair the DLIR's interest in administrative effectiveness, because it could not obtain accurate information that would allow it to adopt prevalent charges.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD:jetf

cc: Gary Hamada, Administrator, Disability Compensation Division
Clyde Imada, Disability Compensation Division
Elienne Yoshida, Research and Statistics Office