

July 18, 1991

Mr. H. S. Weisbrod
c/o Pacific Instrumentation
850 West Hind Road
Honolulu, Hawaii 96821

Dear Mr. Weisbrod:

Re DOT Statewide Airport Property Appraisals

This is in reply to your letter to the Office of Information Practices ("OIP") dated April 10, 1991 requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), statewide airport property appraisals used by the Department of Transportation ("DOT") to revise its Schedule of Rates and Charges must be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, any provision to the contrary notwithstanding, agencies must make available for public inspection and duplication "[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access." See Act 167, P 1, 1991 Haw. Sess. Laws.

The DOT's disposition of public lands (including airport property) through negotiated leases is governed by the provisions of chapter 171, Hawaii Revised Statutes. Under section 171-17(f), Hawaii Revised Statutes, all appraisals used to negotiate the fair market rental value, or to renegotiate the fair market rental value of public land disposed of by lease,

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must be made available for public study. To the extent that the DOT uses the same statewide airport property appraisals to negotiate airport property lease rent as it does to establish the monthly rent paid by those holding revocable permits, as we are informed that the DOT does, the appraisals must be made available for public inspection and duplication. Act 167, § 1, 1991 Haw. Sess. Laws; Haw. Rev. Stat. § 171-17(f) (1985).

Even if the DOT used different appraisals to negotiate the fair market rental value of airport property that is occupied by way of revocable permit under section 171-55, Hawaii Revised Statutes, than it does to negotiate public land lease rent under section 171-17, Hawaii Revised Statutes, under the facts presented, we do not believe that such appraisals would be protected from public inspection under the UIPA.

Specifically, the only UIPA exception to public access that would arguably permit the DOT to withhold access to these appraisals is that which does not require agencies to disclose government records which may result in the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(3) (Supp. 1990). However, we conclude that this UIPA exception does not apply to the DOT appraisals under consideration in this opinion.

The DOT's appraisals do not fall within the examples set forth by the UIPA's legislative history as examples of government records, the disclosure of which may result in the frustration of legitimate government function. Additionally, it would be illogical to conclude that the disclosure of appraisals used by the DOT to establish the monthly rent paid by those using public lands under revocable permit would result in the frustration of a legitimate government function, when appraisals used to establish the fair market rental value of public land leases must be made available for public study under chapter 171, Hawaii Revised Statutes, and when such appraisals are compiled for identical governmental purposes.

Accordingly, we conclude that statewide airport property appraisals used by the DOT to negotiate or otherwise readjust airport lease and permit rents must be made available for public inspection and copying during regular business hours.

FACTS

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Under chapter 171, Hawaii Revised Statutes, the power to manage, administer, and exercise control over public lands is vested in the Board of Land and Natural Resources ("Board"). However, under section 171-11, Hawaii Revised Statutes, the DOT is authorized to exercise all the powers vested in the Board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry, covering lands under the DOT's jurisdiction, including statewide airport property.

All dispositions of public lands by the DOT, including leases, permits, and licenses, are subject to the provisions of chapter 171, Hawaii Revised Statutes, and the prior approval of the Board. See Haw. Rev. Stat. § 171-11 (1985). Except as permitted under chapter 171, Hawaii Revised Statutes, all dispositions of public lands must be made at public auction. Haw. Rev. Stat. § 171-14 (1985). However, the DOT's disposition of airport property for airline or aeronautical purposes may be by way of negotiated disposition, because these uses are exempt from the public auction requirements of chapter 171, Hawaii Revised Statutes. See Haw. Rev. Stat. § 171-59(b) (1985).

Under section 261-7, Hawaii Revised Statutes, the DOT allows persons and organizations to use space and facilities at state airports, under leases and revocable permits, in return for the payment of monthly rent. The monthly rents paid by all airport permittees and lessees are based upon the fair market rental value of the leased or permitted space, as expressed by a dollar per square foot value set forth in a DOT policy entitled "Schedule of Rates and Charges." Among other things, this DOT policy sets forth the rates charged per square foot for such airport property as terminal floor space, ticket counter space, office space, baggage claim areas, VIP lounges, cargo buildings, small plane hangars and improved and unimproved industrial lands.

The DOT revises or readjusts the rates set forth in its Schedule of Rates and Charges every two to three years based upon the results of statewide airport property appraisals performed by two independent appraisers. When a long-term airport lease, such as those granted to airlines, comes up for rent renegotiation under a clause calling for the reopening of the rental to be paid, the DOT also establishes the renegotiated rent based upon the rates then in effect as set forth in the Schedule of Rates and Charges. If the lessee disputes the renegotiated lease rental, the lessee may appoint its own appraiser, who together with the DOT's appraiser, appoint a third appraiser, and the fair

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market rental is established by arbitration. See Haw. Rev. Stat. § 171-17(d) (Supp. 1990).

Concerning persons using airport space under a revocable permit rather than by lease, according to section 8.2.06.6 of the DOT's Departmental Staff Manual, when the DOT's adoption of a revised Schedule of Rates and Charges results in an increase in monthly rentals paid by a permittee, the permittee is notified by letter that new rates and charges have been established, and that the permittee's monthly rental has been revised to reflect such changes. See also, Haw. Rev. Stat. § 171-55 (Supp. 1990); paragraph 3 of the DOT's Airports Division Revocable Permit ("[t]he [DOT] reserves the right to increase or decrease the monthly rental at any time upon thirty (30) days' advanced written notice").

Among the State airport facilities used by persons and individuals under DOT issued revocable permits are small plane hangars called "T Hangars" at the Honolulu International Airport. At present, these T Hangars come in two sizes, 767 square feet and 929 square feet. The DOT is presently constructing T Hangars which are approximately 1200 square feet in size.

According to the DOT's Property Management Division, as with all the rates and charges paid by others using space at airports under lease or permit, the monthly fees paid by those granted space permits for small plane hangars are readjusted every two to three years based upon the results of the two independent statewide airport property appraisals. By letter dated January 18, 1991, the DOT notified you it had revised its rates and charges for all State airport property, and that on March 1, 1991, your monthly permit fee for a T Hangar would be increased from \$134.00 to \$240.00. See Exhibit "A."

You and others who have been issued permits for small plane hangar space asked the DOT to disclose copies of the real estate appraisals used by the DOT to revise its Schedule of Rates and Charges, and thereby adjust the rates and charges paid by those using airport space under revocable permit. According to the DOT its "appraisals are not available for review by the general public since the reports are used for rent renegotiations and are not public records."

By letter dated April 10, 1991, you asked the OIP to render an advisory opinion, as provided for by section 92F-42(3), Hawaii Revised Statutes, concerning whether, under the UIPA, the DOT's

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airport property appraisals must be made available for public inspection and copying. By letter dated September 17, 1990, the DOT also requested a similar OIP opinion, but by letter dated October 25, 1990, it withdrew its opinion request, stating that "[s]ince the appraisals are being used presently for renegotiation, the problem is moot."

DISCUSSION

The UIPA, the State's new open records law, generally states that "[a]ll government records¹ are available for public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). Thus, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1990).

In addition to section 92F-11, Hawaii Revised Statutes', general rule that all government records are public unless access is closed or restricted by law, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information contained therein, that must be made available for inspection as a matter of public policy. The legislative history of the UIPA reflects that "as to these records, the [public access] exceptions such as for personal privacy and frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 1017, 1018 (1988).

Among other things, section 92F-12, Hawaii Revised Statutes, provides in pertinent part:

(b) Any provision to the contrary notwithstanding, each agency shall also disclose:

. . . .

(2) Government records which, pursuant to

¹Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1990). Accordingly, the DOT's airport property appraisals constitute "government records[s]."

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federal law or a statute of this state, are expressly authorized to be disclosed to the person requesting access;

Act 167, § 1, 1991 Haw. Sess. Laws.

With regard to the disposition of public lands, including airport property leases entered into by the DOT, section 171-17, Hawaii Revised Statutes, creates a statutory mechanism by which the rental value of the leased property must be established, including airport property leased by the DOT. This statute provides in pertinent part:

(b) Drawing or negotiation. The sale price or lease rental of lands to be disposed of by drawing or by negotiation shall be no less than the value determined by a disinterested appraiser or appraisers whose services shall be contracted for by the board, at the request of the purchaser and with the approval of the board, shall be at the cost of the purchaser.

. . . .

(d) Reopening. In the event of the reopening of the rental to be paid on a lease, the rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental shall be determined by an appraiser whose services shall be contracted for by the board and the lessee shall be promptly notified of the determination; provided that should the lessee fail to agree upon the fair market rental, the lessee may appoint the lessee's own appraiser who together with the board's appraiser shall appoint a third appraiser and the fair market rental shall be determined by arbitration as provided by chapter 658. . . .

. . . .

(f) Whenever more than one appraiser is appointed each shall prepare and submit an independent appraisal. All appraisal reports shall be available for study by the public.

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Haw. Rev. Stat. § 171-17(b), (d) and (f) (1985 and Supp. 1990)
(emphasis added).

Section 171-17(f), Hawaii Revised Statutes, which requires that all appraisal reports used in fixing the fair market rental of public land leases be available for public study, has remained unchanged since enacted by the First Legislature as part of Act 32, 1962 Haw. Sess. Laws 95, which created a comprehensive statutory scheme for the administration, management, and disposition of public lands of the State of Hawaii. See Act 32, 1962 Haw. Sess. Laws 95.

The legislative history of Act 32 indicates that "[e]very consideration has been given throughout the bill, particularly in the disposition sections, to adequately preserve the assets of the State by authorizing only leases disposable by public auction." H.R. Stand. Comm. Rep. No. 240, 1st Leg., 1962 Reg. Sess., Haw. H.J. at 356 (1962). Although the legislative purpose underlying subsection (f) of section 171-17, Hawaii Revised Statutes, is not clear, the First Legislature may have determined that requiring public access to appraisals used to negotiate lease rent upon public lands would further the Act's purpose to "preserve the assets of the State," by subjecting lease rent negotiations to public scrutiny.

As stated above, according to the DOT's Property Management Division, when an airport lease comes up for lease rent renegotiation, it uses the fair market rental values established in its most recent statewide airport appraisals in negotiating or renegotiating the monthly rentals paid by airport lessees. In light of the provisions of section 171-17(f), Hawaii Revised Statutes, we believe that in accordance with section 92F-12(b)(2), Hawaii Revised Statutes, such appraisal reports must be made available for public inspection and duplication "[a]ny provision to the contrary notwithstanding."

In addition to using the statewide airport property appraisals in negotiating and renegotiating airport lease rents under section 171-17, Hawaii Revised Statutes, the DOT uses them to establish the monthly rental paid by persons using airport property under revocable DOT permits, as set forth in its Schedule of Rates and Charges. To the extent that the DOT uses its airport property appraisals to readjust the rentals paid by both lessees and permittees, it appears to us that section 171-17(f), Hawaii Revised Statutes, requires their public availability. Even assuming, however, that the DOT used

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different appraisals to establish the monthly rent paid by persons using airport property under revocable permit, we do not believe that such appraisals would be protected from access under the UIPA.

We reach this conclusion because the only exception to public access that would arguably protect the DOT's appraisals from public inspection and duplication is that which does not require an agency to disclose "[g]overnment records that, by their nature, must remain confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1990).

Although this statutory exception, as an initial matter, appears somewhat imprecise, Senate Standing Committee Report No. 2580, March 18, 1988, provides examples of government records the Legislature considered eligible for protection under this UIPA exception. Two examples in the Senate Standing Committee report merit examination in view of the nature of the government records at issue:

(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.

.

(3) Information which, if disclosed, would raise the cost of government procurement or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information

(4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;

Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphases added).

The quoted examples were taken almost verbatim from section 2-103(a)(5) and (6) of the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of

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Commissioners on Uniform State Laws, and upon which the UIPA was modeled.² The Model Code commentary³ to these provisions convinces us that neither of the examples in the UIPA's legislative history, quoted above, applies to the DOT's airport property appraisals:

Subsection (a)(5) protects the integrity of the procurement and competitive bidding process. A few states include this type of provision in their freedom of information statutes. Mich. Comp. Laws. Ann. §15.243(1)(j); N.Y. Pub. Off. Law. §87(2)(c); Vt. Stat. Ann. tit. 1, §317(b)(13). Most states, however, have legislation specifically regulating the procurement practices of state or local government, e.g., Ga. Code Ann. §23-1702, -1711; 40-1909-1913; 95A-1205. In that case, subsection (a)(5) does not restrict access to any information expressly made available to the public by that legislation.

²Section 2-103 of the Model Code provides in pertinent part:

2-103. Information Not Subject to Duty of Disclosure.

(a) This Article does not require disclosure of:

. . . .

(5) information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency;

(6) information identifying real property under consideration for public acquisition before acquisition of rights to the property; or information not otherwise available under the law of this State pertaining to real property under consideration for public acquisition before making a purchase agreement;

³The UIPA's legislative history directs those interpreting its provisions to consult the Model Code commentary "where appropriate" to guide in the interpretation of similar UIPA provisions. H.R. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. H.J. 696, 672 (1988).

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Otherwise, an agency in its discretion could use this exemption to withhold information, unless under the circumstances, state law prohibits disclosure of procurement and bidding information altogether. See Section 2-103(a)(11). Once a contract is let or a purchase is made, the exemption generally will no longer apply.

Subsection (a)(6) protects an agency's purchasing power and bargaining position against erratic and artificial change when the acquisition of real property is contemplated. This exemption is among the most common in state freedom of information statutes, e.g., Cal. Gov't. Code § 6254(h); Md. Ann. Code Art. 76A, §3(b)(iv). It does not affect access to information otherwise available under the eminent domain law of the state. An agency cannot claim this exemption after property is acquired or, in the case of condemnation, after a purchase agreement is reached for the property. [Boldface as in original, emphasis added.]

In our opinion, real estate appraisals used to establish the fair market rental value of airport facilities and property that the DOT leases or for which it issues permits do not fit within the list described by the UIPA's legislative history as examples of records which, if disclosed, might frustrate a legitimate government function. The DOT's appraisals do not identify property that is "under consideration for possible future public acquisition."

Additionally, we fail to see how the disclosure of real property appraisals used by the DOT to establish permit fees paid by persons using airport property under revocable space permits could result in the frustration of a legitimate government function by giving airport permittees "a manifestly unfair advantage" in rent negotiations, when State law affirmatively requires the public availability of real property appraisals used by the DOT in disposing of airport property by way of negotiated lease. A conclusion that the disclosure of one appraisal and not the other, both of which are used to establish rent paid for airport space, would frustrate a legitimate government function by giving permittees but not lessees a manifestly unfair advantage would be illogical and contrary to common sense in light of section 171-17(f), Hawaii Revised Statutes.

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Lastly, in our opinion, any restriction contained in the DOT's appraisals which prohibit their reproduction without the written consent of the appraiser would be void as against public policy. Where a statute, such as section 171-17(f) or section 92F-11(b), Hawaii Revised Statutes, establishes the public availability of a government record, the submitter of that record may not unilaterally impose access restrictions upon that record, nor may an agency validly contract to restrict access to the same. See OIP Op. Ltr. Nos. 89-10 (Dec. 12, 1989), 90-39 (Dec. 31, 1990), and cases cited therein.

Accordingly, we conclude that access to real property appraisals used by the DOT to establish the fair market rental value of airport property disposed of by lease or revocable space permit must be made available for public inspection and copying by the DOT during regular business hours. Haw. Rev. Stat. § 92F-11(b) and 92F-12(b)(2) (Supp. 1990).

CONCLUSION

We conclude that under the UIPA, real property appraisals used by the DOT to establish the fair market rental value of airport property under airport leases or permits must be made available for public inspection and duplication. The Legislature has declared, by a specific state statute, that all appraisals used to negotiate or renegotiate the fair market rental value of public lands disposed of by lease must be available for public study. Haw. Rev. Stat. § 171-17(f) (1985).

Even assuming, however, that the DOT used different appraisals to establish the fair market rental value of airport property being disposed of by permit than it does to appraise the value of the airport property disposed of through negotiated airport leases, we conclude that the disclosure of the appraisals would not result in the frustration of a legitimate government function under the UIPA.

Hugh R. Jones
Staff Attorney

HRJ:sc
Attachment
c: Owen Miyamoto

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