

August 28, 1991

MEMORANDUM

TO: The Honorable Winona E. Rubin
Director of Human Services

FROM: Hugh R. Jones, Staff Attorney

RE: Purchase of Service Proposal Rating Sheets

Your memorandum dated May 7, 1991 to the Honorable Warren Price, III, Attorney General, regarding the above-referenced matter has been forwarded to the Office of Information Practices ("OIP") for a reply in accordance with established protocol.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), government records that reflect the State Department of Human Services' evaluation and rating of proposals received in response to a Request for Proposals ("RFP") for the purchase of services must be made available for public inspection and copying.

BRIEF ANSWER

As part of the UIPA, the State's new public records law, the Legislature declared that agencies must make available for public inspection and copying during regular business hours "[g]overnment purchasing information including all bid results, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990).

This provision was included as part of section 92F-12(a), Hawaii Revised Statutes, in large part due to the recommenda-

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tions set forth in the Report of the Governor's Committee on Public Records and Privacy (1987). Based upon our examination

of that report, and the legislative history of section 92F-12 (a)(3), Hawaii Revised Statutes, we conclude that except to the extent that government purchasing information is the type of information described by section 92F-13(3), Hawaii Revised Statutes, as clarified in Senate Standing Committee Report No. 2580, which must remain confidential in order to avoid the frustration of a legitimate government function, or would result in the disclosure of information which is expressly made confidential under State statutes or federal laws, agencies must make government purchasing information available for public inspection and copying.

Based upon our review of the State Department of Human Services' ("DHS") Rating Sheets used to score purchase of service ("POS") agreement proposals, we conclude that they must be made available for public inspection and copying. Information set forth on the Rating Sheets does not fit within the examples of government records described by Senate Standing Committee Report No. 2580 as eligible for protection under section 92F-13(3), Hawaii Revised Statutes. Additionally, the information on the Rating Sheets is not otherwise protected from disclosure by State statutes or federal law.

Lastly, although the names of DHS employees who score POS proposals may not constitute "government purchasing information," we conclude that DHS personnel do not have a significant privacy interest in the fact that they served as a POS proposal rater. Accordingly, the disclosure of the identity of a DHS employee who scores or evaluates a proposal, would not constitute a clearly unwarranted invasion of personal privacy. Therefore, the DHS may not delete the identity of any individual rater before making its Rating Sheets available for public inspection and copying.

FACTS

Pursuant to chapter 42, Hawaii Revised Statutes, the DHS contracts with various organizations or "providers" to supply services to specific members of the general public. These contracts are called "purchase of service" agreements. The term "purchase of service" means an appropriation of public funds for

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the provision of services by an organization to specific members of the public on behalf of an agency to fulfill a public purpose. See Haw. Rev. Stat. § 42-1 (1985).

By way of example, the DHS contracts with organizations through purchase of service ("POS") agreements to provide such services as emergency shelter homes, and child abuse and neglect counseling services. Under section 42-4, Hawaii Revised Statutes, agencies which anticipate the need to purchase services must solicit proposals from potential POS providers.

To solicit proposals from potential POS providers, the DHS publishes a Request for Proposals ("RFP"). Although the proposals are initially submitted to the director of finance, they are then transmitted to the agency requesting the proposals for review. See Haw. Rev. Stat. § 42-4(c) (1985). After receiving POS proposals transmitted by the director of finance, they are reviewed, rated, and scored by DHS personnel, both at the service and fiscal levels.

Specifically, DHS personnel review the contents of each POS proposal and assign it a numerical score using rating criteria set forth in a "Rating Sheet," a copy of which is attached as Exhibit "A." In addition to assigning each POS proposal a numerical score, the DHS's Rating Sheet contains a "comments column" for each reviewer or rater to provide comments. According to the Rating Sheet instructions, the comments section of the Rating Sheet is to be used by the rater to briefly explain the score awarded by the rater.

The POS proposals which receive the highest numerical score after a review by the DHS are then recommended for funding as part of the next biennial budget submitted to the Legislature by the Governor. That is, the POS provider whose proposal receives the highest score is not guaranteed funding. Rather, the DHS makes a recommendation to the Department of Budget and Finance and to the Governor, to include an appropriation in the next biennial budget for a POS agreement with the organization whose proposal receives the highest score.

In its memorandum to the Honorable Warren Price, III, the DHS states that it has been the DHS's past practice to permit public access to all records associated with the DHS's purchase of services, including its POS proposal Rating Sheets. Recently,

individuals from organizations whose POS proposals were not awarded the highest score during DHS review have inspected the DHS' Rating Sheets concerning their proposals and the proposals of competing organizations. According to the DHS, individuals employed by these organizations have sometimes then called the DHS personnel who performed the POS proposal ratings seeking an explanation of their "comments," and even argued with DHS personnel over their rating or score.

In its memorandum requesting an advisory opinion, the DHS requests a clarification of "whether it is necessary for [the DHS] to continue the practice of releasing the comments along with the ratings" on its POS proposal Rating Sheets. Additionally, the DHS requests advice concerning whether the names of DHS personnel who perform the POS proposal ratings must be disclosed to the public upon request.

DISCUSSION

The UIPA, the State's new open records law, generally provides that "[a]ll government records are open to inspection and copying unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). In addition to this general rule of agency disclosure, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of records, or information, which must be made available for inspection as a matter of law. The legislative history of section 92F-12, Hawaii Revised Statutes, states that "[t]his list merely addresses some particular cases by unambiguously requiring disclosure." 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. 817, 818 (1988).

With regard to government procurement information, section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

§92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

. . . .

(3) Government purchasing information including all

bid results except to the extent prohibited by
section 92F-13;

Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990) (emphases added).

We have previously noted that most of the government records described by section 92F-12(a), Hawaii Revised Statutes, were included by the Legislature in response to recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report").¹ The inclusion of "government purchasing information" in section 92F-12(a), Hawaii Revised Statutes, is no exception. Specifically, with respect to public access to government purchasing information and bid documents and results, the Governor's Committee Report states:

The next issue raised was the availability of bid documents and results. There was, however, very little dispute over this issue. It is agreed that documents and results are available though not until the time of the award since the premature release of information might undermine the public purpose of the bid process. See Comptroller Russel Nagata (II at 13) and Honolulu Managing Director Jeremy Harris (II 14) at 116). Both also noted that even after the award, there may be some material that should remain confidential either because it involves trade secrets (Nagata and Harris) or personal information (Harris). As Harris noted, however, the burden is on the bidder to establish that any material should be confidential.

Also raised was the availability of government purchasing information. The basic thrust is that anytime taxpayer money is spent, the taxpayers have a right to see how it was spent. See Joseph Bazemore, Hawaii Building and Construction Trades Council, AFL-CIO (II at 199 and I(H) at 35-37). See also Kelly Aver (I(H) at 2), who felt such information should be available to monitor abuse. To some degree, this is covered by issues discussed above

¹The UIPA's legislative history acknowledges the important role that the Governor's Committee Report played in drafting the UIPA. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093 (1988)

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under such headings as government employees, public works and bid results. There is also, however, a desire to ensure that all State and county purchasing information is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that personal information should be much of a concern and vendors who do business with the State should not have an expectation of privacy as to that sale.

Vol I. Report of the Governor's Committee on Public Records and Privacy 114 (1987) (boldface in original) (emphasis added).

Importantly, however, unlike other government records described by subsection (a) of section 92F-12, Hawaii Revised Statutes, the Legislature appears to have placed some restrictions on the public availability of government purchasing information.² Specifically, in requiring the public availability of government purchasing information, the Legislature stated it must be disclosed by an agency "except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990) (emphasis added).

In OIP Opinion Letter No. 90-15 (April 9, 1991), we examined this phrase, and based upon section 92F-12(a)(3), Hawaii Revised Statutes' legislative history quoted above, we concluded that the Legislature intended that government purchasing information be publicly available, except to the extent that such information must remain confidential in order to avoid the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

We reached this conclusion because the Governor's committee Report noted that in some cases "government purchasing information" may involve such things as "trade secrets."

²The UIPA's legislative history indicates that as to the records described by section 92F-12(a), Hawaii Revised Statutes, "the [UIPA's] exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 817, 818 (1988).

Additionally, the legislative history of section 92F-13(3), Hawaii Revised Statutes, indicates that the Legislature believed that the disclosure of certain government purchasing information may result in the frustration of a legitimate government function and may be withheld by an agency under section 92F-13(3), Hawaii Revised Statutes:

(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.

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

.

(6) Proprietary information, such as . . . computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;

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

Stand. Comm. Rep. No. 2350, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphases added).

Accordingly, we conclude that the phrase "except to the extent prohibited by section 92F-13," set forth at section 92F-12(a)(3), Hawaii Revised Statutes, permits agencies to deny access to those portions of government purchasing records that contain information falling within one of the examples of government records described by Senate Standing Committee Report

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No. 2580, quoted above, that must remain confidential in order to avoid the frustration of a legitimate government function.³ Additionally, of course, agencies may withhold government purchasing information which is made confidential under State statutes or federal law. See Haw. Rev. Stat. § 92F-13(4), Hawaii Revised Statutes.

Lastly, although we have previously stated that agencies may, under section 92F-13(3), Hawaii Revised Statutes, deny access to certain intra-agency and inter-agency memoranda which are covered by the deliberative process privilege, in our opinion the DHS's Rating Sheets do not fall within this privilege since they are not predecisional. The Rating Sheets do not express recommendations to an agency decision-maker on an issue of policy or law. On the contrary, the Rating Sheets are decisional in nature, because they determine which POS proposal will receive a recommendation for budget funding by the agency.

Turning to an examination of the Rating Sheets used by DHS personnel to score or evaluate the proposals submitted by potential POS providers, they set forth the score awarded to each POS proposal, based upon such criteria as the proposal's (1) program content and scope, (2) program quality, (3) budget and cost efficiency, and (4) quality of the POS provider's staff. See Exhibit "A." It is based upon the rating assigned by DHS personnel evaluating a POS proposal that a decision is made whether to recommend that the Legislature fund a proposal in the next executive budget. Accordingly, we conclude that the Rating Sheets, and information set forth therein, constitute "government purchasing information" within the meaning of section 92F-12(a)(3), Hawaii Revised Statutes.

Additionally, based upon our review of the DHS's POS proposal Rating Sheet, it would be only in the most unusual of cases that the Rating Sheet would contain information described by Senate Standing Committee Report No. 2580, quoted above, that must remain confidential in order to avoid the frustration of a

³We note that section 103-27, Hawaii Revised Statutes, provides that upon the opening of sealed bids on government contracts, all bids may be inspected by any bidder who attends the opening. We need not determine in this opinion whether in view of the fact that sealed bids must be publicly opened, sections 92F-12(a)(3) and 92F-13(3), Hawaii Revised Statutes, nevertheless permits an agency to deny access to certain information in sealed bids after the date of the bid opening by an agency.

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legitimate government function. Specifically, it would be highly unlikely that the Rating Sheets would contain "trade secrets," "confidential commercial and financial information," "proprietary information," or information which would raise the cost of government procurements if disclosed.

Therefore, we conclude that Rating Sheets used by the DHS to evaluate and score POS proposals constitute "government purchasing information" that must be made available for public inspection and duplication upon request by any person under section 92F-12(a)(3), Hawaii Revised Statutes.

In answer to the DHS's question regarding whether it may withhold the names of DHS personnel who act as raters, as set forth on its Rating Sheets, arguably this information is not "government purchasing information." However, we do not believe that agency personnel who evaluate proposals received by an agency in response to an RFP have a significant privacy interest in this fact. Under section 92F-12(a)(14), Hawaii Revised Statutes, except for individuals employed in an undercover capacity with a law enforcement agency, the names of agency employees, their job positions, and position descriptions are specifically designated as public information.

Moreover, in OIP Opinion Letter No. 89-9 (Nov. 20, 1989), we concluded that the disclosure of names of University of Hawaii faculty who served on the William S. Richardson School of Law's admissions committee would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. Similarly, in OIP Opinion Letter No. 90-16 (April 24, 1990), we concluded that the disclosure of the names and job titles of individuals serving on a faculty search committee at Honolulu Community College, University of Hawaii, would not constitute a clearly unwarranted invasion of personal privacy.

As with the names of University of Hawaii employees who serve upon academic admissions or faculty search committees, we believe that the disclosure of the names of agency personnel who evaluate RFP or POS proposals would not constitute a clearly unwarranted invasion of personal privacy. Accordingly, the DHS should not delete the identity of the DHS employee who served as a rater from its Rating Sheets in response to a request to inspect or copy the same.

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CONCLUSION

The UIPA affirmatively requires that agencies make available for inspection and copying during regular business hours "government purchasing information, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. §92F-12(a)(3) (Supp. 1990).

In examining the phrase "except as prohibited by section 92F-13," we conclude, based upon the UIPA's Legislative history, that the Legislature intended that agencies be free to deny access to government purchasing information that falls within the examples of government records described by Senate Standing Committee Report No. 2580 that must remain confidential in order to avoid the frustration of a legitimate government function.

Because we conclude that the DHS's Rating Sheets constitute "government purchasing information," and because the information set forth therein does not fit within the examples of government records described by Senate Standing Committee Report No. 2580 that must remain confidential in order to avoid the frustration of a legitimate government function, we conclude that the Rating Sheets, including the comments set forth therein by the rater, must be made available for public inspection and copying.

We also conclude that even though the names of DHS personnel who conduct the rating of POS proposals may not constitute "government purchasing information," the disclosure of this information would not constitute a clearly unwarranted invasion of personal privacy. Accordingly, under the UIPA, the names of DHS personnel who rate POS proposals, as set forth on the DHS Rating Sheet, must be made available for public inspection and copying upon request by any person.

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HRJ:sc
Attachment

APPROVED:

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Director