

November 21, 1991

Mr. Dale Reno
Executive Vice President
Founders Title and Escrow of Hawaii
900 Fort Street, Suite 1000
Honolulu, Hawaii 96813

Attention: Mr. Brian Takara

Dear Mr. Reno:

Re: Proposals to Provide Title Services for
Leasehold Fee Purchases

This is in response to your letter dated March 4, 1991, requesting an advisory opinion regarding public access to proposals accepted by the State of Hawaii Housing Finance and Development Corporation, Department of Budget and Finance ("HFDC"), to provide title reports and policies to individuals purchasing the leasehold fee interests in their residential leasehold properties ("purchasers").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the HFDC must make available for public inspection and duplication the accepted proposals from title companies selected to provide title reports and policies to individuals purchasing the leasehold fee interests in their residential leasehold properties ("accepted proposals").

BRIEF ANSWER

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A title company does not have a cognizable privacy interest under the UIPA because the UIPA only recognizes the privacy interests of "individuals." Haw. Rev. Stat. § 92F-14(a) (Supp. 1990). Further, we do not believe that the individuals purchasing the title policies, whose identities can be ascertained from other public records, have a privacy interest in the accepted proposal's terms. Even if we assume that the accepted proposal describes a purchaser's "financial history or activities" in which the purchaser would have a significant privacy interest, in our opinion, the public interest in the disclosure of the accepted proposal, which sheds light on the State's role in leasehold fee conversions, would outweigh this privacy interest. Therefore, we believe that the disclosure of the accepted proposal would not constitute a clearly unwarranted invasion of personal privacy. See Haw. Rev. Stat. § 92F-13(1) (Supp. 1990).

We also find that the disclosure of the accepted proposal would not frustrate a legitimate government function. Specifically, in our opinion, the disclosure of the accepted proposal would not give a "manifestly unfair advantage" to any title company proposing to provide title services for leasehold fee purchases. Also, we do not believe that the proposal contains any "confidential commercial or financial information." Because the accepted proposal is not protected by any UIPA exception, the HFDC is required to make the accepted proposal available for public inspection and copying under the UIPA.

In addition, section 92F-12(a)(3), Hawaii Revised Statutes, requires agencies to publicly disclose "[g]overnment purchasing information" if the disclosure of the information is not prohibited under a UIPA exception set forth in section 92F-13, Hawaii Revised Statutes. Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990). In our opinion, an accepted proposal constitutes "[g]overnment purchasing information" and, as such, would be subject to public inspection and copying since it is not protected by a UIPA exception. Id.

FACTS

Under chapter 516, Hawaii Revised Statutes, if the required number of residential lessees in a development tract applies to

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the HFDC to purchase the leasehold fee interest in their residential properties, the HFDC is authorized to acquire the fee interest in these properties by the exercise of the power of eminent domain or by purchase under the threat of eminent domain. Haw. Rev. Stat. §516-22 (Supp. 1990). In the complaint for the condemnation action, the HFDC lists the names of those lessees who applied to purchase the leasehold fee interest in their properties. Within sixty days of the HFDC's acquisition, the lessees who applied to the HFDC and met the statutory qualifications for a leasehold fee purchase ("purchasers") must buy the fee interest in their properties from the HFDC.

In preparation for their purchases, the purchasers may collectively choose a particular title company to provide the title reports and policies for the tract properties which they are purchasing in fee and, generally, the HFDC will agree to the purchasers' selection. If the purchasers do not select a title company, the HFDC will solicit proposals from title companies to provide the title services and will select a title company based upon the following criteria: (1) the cost of its title services, (2) its ability to provide the title services under certain conditions, including the statutory time constraints imposed upon the HFDC and the purchasers, and (3) the company's previous experience and expertise in providing title services. According to the HFDC, in most cases, its selection of a title service company is not subject to the competitive bidding requirements set forth in chapter 103, Hawaii Revised Statutes, because the portion of the title services costs for which the HFDC will pay and receive reimbursement from the purchasers is below the minimum dollar amount that would require public competitive bidding.

After selecting a title company, the HFDC uses a standard proposal format to draft the final version of the proposal. The HFDC sends the final proposal to the selected company to review and return to the HFDC with the signature of a company official. The HFDC formally accepts the final proposal by the signature of an agency official on the proposal ("accepted proposal"). The accepted proposal states that the proposal, the HFDC's acceptance of the proposal, and the HFDC's notice of acceptance mailed to the title company together constitute a binding contract between the title company and the HFDC.

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The accepted proposal typically provides that the title company will deliver the preliminary title reports to the HFDC by a specified date, and will receive payment from the HFDC for the reports upon their delivery. The HFDC is reimbursed for its payments to the title company from deposits or payments made by the purchasers. In addition, under the terms of the accepted proposal, the title company will provide the remaining title policies at the closing of the fee sales to the respective purchasers, at which time the purchasers will pay the remaining costs to the title company. In most cases, the cost of a preliminary title report is a flat fee per property, while the cost of the title policy is based upon the purchase price of the leasehold fee property.

Currently, the HFDC will not publicly disclose the proposals which it has accepted. A typical proposal accepted by the HFDC sets forth the selected title company's name, the name of the development tract in which the leasehold fee purchases will occur, the costs of the company's title services for the tract properties that will be purchased in fee, and the other agreed upon proposal terms.

According to your letter, Founders Title and Escrow has previously submitted several proposals to the HFDC to provide title services for different development tracts undergoing leasehold fee conversions. The HFDC has not selected any of the past proposals submitted by your company. Thus, you have requested the HFDC to disclose the identities of the selected title companies and the costs of their title services set forth in the proposals accepted by the HFDC.

Because the HFDC denied your request for access to those government records, you have requested an opinion from the Office of Information Practices ("OIP") regarding whether the UIPA requires the HFDC to make the accepted proposals available for public inspection and duplication.

DISCUSSION

I. INTRODUCTION

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The proposal that the HFDC accepts to provide title services to leasehold fee purchasers is a "government record" because it constitutes "information maintained by an agency in written . . . form." Haw. Rev. Stat. § 92F-3 (Supp. 1990).

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). As exceptions to this general rule, section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

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

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (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(1) & (3) (Supp. 1990). The relevant exceptions to disclosure are discussed separately below.

II. PRIVACY

The UIPA states that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1990). Hence, we must consider the competing public and privacy interests in the accepted proposal for title services. Notably, the UIPA only recognizes "the privacy interests of the individual," which term is defined to mean "a natural person." Id. (emphasis added) and § 92F-3 (Supp. 1990). Thus, a title company, which is not a natural person, has no privacy interest under the UIPA.

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Although the accepted proposal does not identify the individual purchasers in a residential tract who will be receiving the title services, the purchasers' identities may be ascertained from other property and leasehold fee conversion records that are open to public inspection. Even so, the accepted proposal itself only reveals the terms of the title services for which these particular purchasers will be receiving, including the costs that they will be paying. In our opinion, a purchaser has little, if any, privacy interest in this information. However, this information may arguably constitute "[i]nformation describing an individual's . . . financial history or activities" in which the UIPA recognizes a significant privacy interest. Haw. Rev. Stat. § 92F-14(b)(6) (1990).

Yet, even if we assumed that the purchasers have a significant privacy interest in the accepted proposal's terms, we find that the disclosure of the accepted proposal greatly furthers the public interest in the State's exercise of its power of eminent domain and other actions in the leasehold fee conversion of a development tract. In our opinion, the proposal that the HFDC accepts for title services on behalf of the purchasers sheds much light upon the State's involvement in the leasehold fee conversion process. Thus, we believe that this public interest in the accepted proposal's disclosure outweighs the privacy interest that the purchasers may have. The disclosure of the accepted proposal, therefore, would not constitute a clearly unwarranted invasion of the purchaser's privacy. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990).

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

For guidance in applying the exception set forth in section 92F-13(3), Hawaii Revised Statutes, the UIPA's legislative history provides "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," including the following examples that are relevant to the facts at hand:

- (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

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with an agency, including information pertaining to collective bargaining;

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

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

We do not believe that the accepted proposal falls within either of these examples of information to which the "frustration of a government function" exception may apply. First, we previously opined that the disclosure of a proposal submitted to an agency may "give a manifestly unfair advantage" to another party during the agency's review and negotiations about a proposal before the agency's acceptance of it, but not after the agency has contracted to accept a proposal. See OIP Op. Ltr. No. 89-15 (Dec. 20, 1989) (Aloha Tower Development proposals are not required to be disclosed before the agency and a developer complete their negotiations and enter into a lease and development agreement); see also OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (geothermal project proposals).

As we explained in the advisory opinions cited, the concept of a "manifestly unfair advantage" was based on section 2-103(a)(5) of the Uniform Information Practices Code ("Model Code"), drafted in 1980 by the National Conference of Commissioners on Uniform State Laws. House Standing Committee Report No. 342-88, dated February 19, 1988, expressed the Legislature's intent that "the commentary to the Model Uniform Information Practices Code . . . guide the interpretation of similar provisions found in the [UIPA] created by this bill where appropriate." H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). As the Model Code commentary explains, section 2-103(a)(5) of the Model Code was intended to protect "the integrity of the procurement and competitive bidding process Once a contract is let or a purchase is made, the exemption generally will no longer apply." Model Code § 2-103 commentary at 17 (1980) (emphasis added). Accordingly, we find that after a contract for title services has been finalized by the formal acceptance of a proposal, the

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disclosure of the accepted proposal would not give a "manifestly unfair advantage" to any person that submitted a proposal.

Next, we consider whether an accepted proposal fits within the category of "trade secrets or confidential commercial or financial information." In our review of the HFDC's standard proposal format, we find that it does not contain "trade secrets." See OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (definition of trade secret discussed). For guidance in assessing what constitutes "confidential commercial and financial information," our previous advisory opinions have referred to exemption (b)(4) of the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. See, e.g., OIP Op. Ltr. No. 90-15 (April 9, 1990). Authorities applying exemption (b)(4) of the FOIA have held that commercial and financial information is "confidential," "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

In OIP Opinion Letter No. 90-15 (April 9, 1990), we opined that the disclosure of component or unit prices in a lump-sum bid on a government contract would not result in substantial competitive harm to a bidder, nor would the disclosure of this information impair the ability of the contracting agency to obtain information in the future. Consequently, we concluded that the disclosure of this information would not result in the frustration of a legitimate government function and, therefore, component or unit prices are subject to public inspection under section 92F-12(a)(3), Hawaii Revised Statutes. See OIP Op. Ltr. No. 90-15 (April 9, 1990).

In our opinion, the costs set forth in the accepted proposal for the preliminary title report and the title policy for each property essentially constitute "component or unit prices" of the proposal as a whole, namely, to provide title services for all leasehold fee purchases occurring in a particular development tract. Applying the analysis set forth in OIP Opinion Letter No. 90-15, we believe that the disclosure of these component or unit prices for title services would cause neither substantial

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competitive harm to a title company nor impairment of the HFDC's ability to obtain similar proposals in the future. See id.; see also Pacific Architects and Engineers v. United States Dep't of State, 906 F.2d 1345 (9th Cir. 1990) (a competitor cannot calculate a contractor's profit margin from unit price rates). We note that the title services costs set forth in the accepted proposal may differ from a title company's standard title service fees which are generally disclosed upon request by the title company. Even if that is the case, we find that the costs set forth in the accepted proposal do not reveal information about the title company's operations that would constitute "confidential commercial and financial information." Cf. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672, 676 (D.C. Cir. 1976) ("exhaustive cataloging of operating data which provides a complete picture of concessioner's operating condition" is exempt from disclosure). Therefore, we do not believe that the disclosure of the title service costs would frustrate any legitimate government function.

Further, we find that the disclosure of the title company's identity and the other terms in the accepted proposal, i.e., services to be rendered, delivery and payment schedules, and other conditions, would not frustrate any legitimate government function. In our opinion, like the component costs of the title services to be provided, these other proposal terms do not constitute the type of information which, if disclosed, would cause competitive harm to the title company or impair the HFDC's ability to obtain proposals for title services in the future. Such terms are commonly disclosed in other agencies' contracts for the purchase of services without having frustrated the agencies' contracting functions. Thus, we find that an accepted proposal must be made available for public inspection and copying because this government record is not protected by a UIPA exception.

IV. GOVERNMENT RECORDS EXPRESSLY MADE PUBLIC

An accepted proposal may fall within one of the categories of records set forth in section 92F-12, Hawaii Revised Statutes, that the Legislature declared must be made public "as a matter of public policy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No.

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112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988). Specifically, 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; *fff,,*

. . . .

(10) Regarding contract hires and consultants employed by agencies; the contract itself, the amount of compensation, the duration of the contract, and the objectives of the contract;

Haw. Rev. Stat. § 92F-12(a)(3) & (10) (Supp. 1990).

In our opinion, an accepted proposal constitutes "[g]overnment purchasing information." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990). We believe that the HFDC "purchases" a title company's services because it solicits and accepts the company's proposal and also pays for the preliminary title reports. In our opinion, the HFDC's "purchase" is not changed by the fact that the purchasers receive the title services, reimburse the HFDC, and pay for the remaining title services at closing. As "[g]overnment purchasing information," the accepted proposal would be required to be made public under section 92F-12(a)(3), Hawaii Revised Statutes, if disclosure is not "prohibited by section 92F-13," Hawaii Revised Statutes. As we have already discussed, an accepted proposal is not protected by any exception set forth in this section and, hence, must be made available for public inspection and copying. See Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1990).

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However, we do not believe that the accepted proposal falls within the category of records set forth in section 92F-12(a)(10), Hawaii Revised Statutes, "[r]egarding contract hires and consultants employed by agencies." By providing title services to purchasers, a title company apparently is not serving in the capacity of a "consultant" that provides opinions and recommendations to a government agency. See OIP Op. Ltr. No. 90-21 (June 20, 1990) (discussion of a consultant's role in an agency's deliberative process).

To verify the Legislature's intent behind the term "contract hire," we examined the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report") which provided the foundation for many of the provisions of section 92F-12(a), Hawaii Revised Statutes. With regard to "state and county contract hires," the Governor's Committee Report notes that "contract hires avoid the normal civil service hiring mechanisms or bidding processes." Vol. I Governor's Committee Report 110 (1987). From this language, we believe that the Legislature intended the term "contract hire" to refer to "persons employed by contract" to fill government "positions," terms used in the civil service statute, chapter 76, Hawaii Revised Statutes. See Haw. Rev. Stat. § 76-16 (Supp. 1990). Thus, because a title company providing title services to purchasers is not filling a government position, the company cannot be characterized as a "contract hire."

Therefore, since an accepted proposal does not relate to "consultants" or "contract hires," its disclosure would not be governed by section 92F-12(a)(10), Hawaii Revised Statutes. However, as previously discussed, an accepted proposal must be made available to the public in accordance with other UIPA provisions. See Haw. Rev. Stat. § 92F-11(a) and § 92F-12(a)(3) (Supp. 1990).

CONCLUSION

The disclosure of proposals accepted by the HFDC to provide title reports and policies to leasehold fee purchasers would not constitute a clearly unwarranted invasion of the purchasers' privacy, nor would the disclosure of the accepted proposals frustrate a legitimate government function of the HFDC by giving

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a "manifestly unfair advantage" to a title company or by revealing any confidential commercial or financial information. See Haw. Rev. Stat. § 92F-13(1) and (3) (Supp. 1990). Therefore, because no UIPA exception applies, the proposal must be made available for public inspection and copying. Also, since no UIPA exception applies, an accepted proposal is also subject to public inspection as "government purchasing information" under section 92F-12(a)(3), Hawaii Revised Statutes.

Very truly yours,

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