Op. Ltr. 92-17 Attachments to Hawaii Visitors Bureau Contract
OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

September 2, 1992

The Honorable Mufi Hannemann
Director of Business, Economic
Development & Tourism
Central Pacific Plaza
220 S. King Street, 11th Floor
Honolulu, Hawaii 96813

Attention: Ms. Barbara Kim Stanton
Deputy Director for Tourism

Dear Mr. Hannemann:

Re: Attachments to Hawaii Visitors Bureau Contract

This is in reply to a letter to the Office of Information Practices ("OIP") from Ms. Barbara Kim Stanton, Deputy Director for Tourism, requesting an advisory opinion concerning whether the attachments to the contract between the Department of Business, Economic Development & Tourism ("DBED") and the Hawaii Visitors Bureau ("HVB") must be disclosed in response to requests by Ms. Catherine Cruz, a reporter with KITV4 News, and by other members of the public. DBED has already provided these requesters with a copy of the contract.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), attachments to the contract between DBED and the HVB ("HVB Contract") must be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, all government records must be made

available for public inspection and copying unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, protects the records from required agency disclosure. See Haw. Rev. Stat. □92F-11(b) (Supp. 1991). The term "government record" under the UIPA means "information maintained by an agency in written, visual, auditory, electronic, or other physical form." Haw. Rev. Stat. □92F-3 (Supp. 1991) . Because the HVB Contract constitutes "information maintained by an agency in written . . . form," it is our opinion that it is a "government record" under the UIPA.

In addition to the UIPA's general rule that all government records are public unless access is closed or restricted by law, the Legislature affirmatively required all State and county agencies to make available for public inspection and copying "government purchasing information, including all bid results except to the extent prohibited by section 92F-13," Hawaii Revised Statutes. Haw. Rev. Stat. □92F-12(a) (3) (Supp. 1991) . Except for information contained in Attachment No. 4 about the salaries of certain HVB employees, we find that the attachments to the HVB Contract are not protected from disclosure by any of the exceptions set forth in section 92F-13, Hawaii Revised Statutes.

Under the UIPA's "frustration of a legitimate government function" exception, section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose "trade secrets or confidential commercial and financial information." However, in our opinion the HVB has not made a sufficient showing that reasonable efforts have been taken to guard the secrecy of the information, and for other reasons explained in this opinion, we believe that information in the attachments to the HVB Contract does not comprise confidential commercial and financial information.

Additionally, based solely upon the conclusory assertions of the HVB that the information is a trade secret, the OIP does not believe that a court would find the information contained in the attachments to the HVB Contract to be trade secrets under Hawaii's Uniform Trade Secrets Act, chapter 482B, Hawaii Revised Statutes. However, before DBED makes this information available for public inspection and copying, we recommend that DBED notify the HVB of its intention to publicly disclose this information, and give the HVB a reasonable period of time to seek an order restraining DBED's disclosure of the attachments to the HVB Contract under chapter 482B, Hawaii Revised Statutes.

Moreover, because under the UIPA only natural persons have

cognizable personal privacy interests, we conclude that the HVB has no personal privacy interest in the attachments to the HVB Contract that is protectible under the UIPA. However, we find that HVB employees have a significant privacy interest in the information about their salaries set forth in Attachment No. 4 to the HVB Contract.

HVB employees are not "public employees" and, therefore, their salaries are not expressly made public under section 92F-12(a)(14), Hawaii Revised Statutes, which we believe was intended to apply only to individuals employed by the executive, legislative, or judicial branches of the State or county governments. In balancing HVB employees' significant privacy interest in their income, as provided in section 92F-14(b)(6), Hawaii Revised Statutes, against the public interest in disclosure, we conclude that on balance, the HVB employees' privacy interest prevails.

While disclosure of the salaries of all HVB employees would, to some degree, promote governmental accountability, and thereby further the public interest in disclosure, this interest is equally advanced by DBED's disclosure of information concerning the salaries paid to HVB employees that does not identify the individual employees.

Thus, we conclude that, except for those HVB employees' salaries which, under federal law, must be publicly available in the HVB's annual tax return on IRS Form 990, the salaries paid to HVB employees identified by name in Attachment No. 4 to the HVB Contract should not be publicly disclosed because the disclosure of this information would constitute a clearly unwarranted invasion of such employees' personal privacy. However, after information that would likely identify individual HVB employees has been segregated or removed from Attachment
No. 4, we believe that it must be made available for inspection and copying upon request.

FACTS

In 1990, the Legislature created the State Office of Tourism within DBED. The Office of Tourism's duties include "[p]romoting, coordinating and developing the tourism industry in the State, . . . establishing a program to monitor and investigate complaints about problems resulting directly or indirectly from the tourism industry . . . [and] [d]eveloping and implementing the State tourism marketing plan." Haw. Rev. Stat. □201-93 (Supp. 1991).

Under section 201-95(a), Hawaii Revised Statutes, the Office of Tourism is authorized to contract with the HVB or any other visitor industry organization "to perform tourism promotion, marketing, and development." The Office of Tourism is also directed to annually review "the expenditure of public funds by the Hawaii Visitors Bureau or any other visitor industry organization" and to make recommendations necessary to ensure effective use of the funds for the development of tourism. See Haw. Rev. Stat. §201-95(b) (Supp. 1991).

The HVB is a non-profit corporation organized under the laws of the State of Hawaii. The HVB is also exempt from federal taxation under section 501(c) (6) of the Internal Revenue Code. According to its Charter of Incorporation, the purpose of the HVB is "to promote traveling by the public to and among all the Hawaiian Islands" and to "maintain a continuing interest in the well-being of visitors in Hawaii." In carrying out these objectives, the HVB's Charter of Incorporation provides that it shall "report to the public at regular intervals its activities and such information concerning or affecting the travel industry to and within the State of Hawaii as may be deemed of public interest."

By Contract No. 31397 dated October 24, 1991, DBED contracted with the HVB to perform tourism marketing, promotion and development. The HVB Contract also provides that DBED agrees to pay the HVB for the 1991-92 fiscal period, a total amount not to exceed seventeen million dollars, and for the 1992-93 fiscal period, an amount not to exceed eighteen million dollars as full compensation for the HVB's services. The HVB Contract also provides that the HVB will be paid by DBED on a monthly basis "upon receipt of a monthly statement submitted by the HVB showing the amount requisitioned." The HVB Contract further states that amounts paid to the HVB shall be expended in accordance with programs identified in its marketing plan, a copy of which is attached to the contract.

According to its most recent annual report, 90% of the HVB's operating budget for the 1991-1992 fiscal year is derived from State funding. A 1987 performance audit conducted by the Office of the Legislative Auditor describes the HVB's history of government funding as follows:

> For about the first 40 years of its existence, HVB received approximately $1 in government support for every $2 it received in subscriptions from the business community. However, this ratio began to

> change after World War II. In 1949, the Legislature agreed to match private contributions to HVB dollar-for-dollar up to $250,000 each year for the following two years. By 1960, state appropriations amounted to 62.4 percent of the HVB's budget, reaching 80.6 percent two years later. The state share of the HVB budget declined and leveled off somewhat in the late 1960's and early 70's. Today, legislative appropriations account for nearly 80 percent of the HVB's operating budget.

The Office of the Legislative Auditor, Management Audit of the Hawaii Visitor's Bureau and the State's Tourism Program, Report No. 87-14 at 32-33 (1987) ("Legislative Auditor's Report").

In early March 1992, Ms. Catherine Cruz, a news reporter with KITV4 News, and other members of the public requested DBED's Office of Tourism to provide them with a copy of the HVB Contract. By letter dated March 12, 1992 HVB's legal counsel, Seth M. Reiss, objected to DBED's public disclosure of Attachment Nos. 1 through 4 to the HVB Contract. Specifically, in a letter to the State Deputy Director for Tourism, HVB's legal counsel stated:

> It is the HVB's position that Attachment Numbers 1, 2, 3, and 4 contain confidential, private, trade secret, sensitive, and/or proprietary information and that these attachments should not be disclosed to KITV4 or any other member of the public pursuant to Haw. Rev. Stats. chapter 92F or any other statute or recognized legal doctrine.

Letter from Seth M. Reiss to Barbara Kim Stanton, Deputy Director for Tourism at 2 (March 12, 1992).

Attachment Number 1 to the HVB Contract is entitled "HVB Budget and Marketing Plan." The first five pages of Attachment Number 1 set forth general information concerning the HVB's strategy for marketing and promoting Hawaii as a tourism destination. Twelve pages of Attachment Number 1 set forth, in detail, HVB "budget requests." For each HVB budget item, Attachment Number 1 shows the total requested, the amount that will be paid from public or "State" funding, and the amount that will be paid through HVB's private funding. Unless approved by DBED, the HVB must expend its public appropriation in accordance with the budget attached to the HVB Contract.

Attachment Number 2 to the HVB Contract is entitled "Fiscal Policies (HVB Financial Policies and Procedures)," and is six pages long. It describes how the HVB budget is prepared, HVB's purchasing policies, prohibitions on the payment of entertainment and other expenses from State funds, and HVB policies on the payment of travel and automobile expenses.

Attachment Number 3 to the HVB Contract is forty-three pages in length, and is entitled "Personnel Policies (HVB Employee Handbook)." As its name suggests, this contract attachment is an HVB employee handbook dated August 1988, and explains the HVB's employment policies, employment benefits, standards of conduct, and disciplinary procedures.

Attachment Number 4 to the HVB Contract is entitled "Position and Pay Schedule," and it sets forth the following information concerning each HVB employee for the 1991-1992 fiscal year: position title, name, employment date, salary level, salary range (from minimum to maximum), and annual salary. The Position and Pay Schedule includes information about individuals employed in the HVB's Oahu, Neighbor Island, mainland, and international offices.

In addition to asserting that the HVB Contract attachments are protected from disclosure under the UIPA, the HVB's attorney also asserts in his letter dated March 12, 1992, that the UIPA protects against invasions of corporate privacy:

> Hawaii Revised Statutes □ 92F-3 defines "person" to include corporation. Consequently, the invasion of personal privacy referred to in Haw. Rev. Stats. □□92F-13(1) and 92F-14 should be construed to include invasions of corporate privacy. It is the HVB's position that the public disclosure of any of the attachments 1, 2, 3, or 4 would constitute a clearly unwarranted invasion of its corporate privacy.

Letter from Seth M. Reiss to Barbara Kim Stanton, Deputy Director for Tourism at 1-2 (March 12, 1992).

Finally, the HVB's legal counsel argues that there is a "significant question whether the attachments to the [HVB] contract can be construed to be government records" under the UIPA. Id. at 1.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a] ll government records are open to inspection unless access is closed or restricted by law." Haw. Rev. Stat. □92F-11(a) (Supp. 1991). Specifically, the UIPA states that "[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. 1991).

Under 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. 1991) . The Office of Tourism is a unit of government in this State, and as such, it is an "agency" under the UIPA. See Haw. Rev. Stat. □92F-3 (Supp. 1991) . Moreover, because the Office of Tourism maintains[1] a copy of the HVB Contract, the HVB Contract (including the attachments) is a "government record" under the UIPA.

II. GOVERNMENT PURCHASING INFORMATION

In addition to the UIPA's general rule that all government records are public unless access is closed or restricted by law, in section 92F-12(a), Hawaii Revised Statutes, the Legislature set forth a list of government records that must be made available for public inspection and copying "[a] ny provision to the contrary notwithstanding." Subsection (a) of section 92F-12, Hawaii Revised Statutes, provides in pertinent part:

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[1]In OIP Opinion Letter No. 91-5 at 6 (April 15, 1991), we concluded that the term "maintain" should be construed to mean "to hold, possess, preserve, retain, store, or administratively control." This conclusion was based upon the definition of the term "maintain" set forth in the definition section of the Uniform Information Practices Code, which was drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled. We believe that the HVB Contract would also constitute an "agency record" under the more restrictive definition of that term under the federal Freedom of Information Act, 5 U.S.C. □552 (1988) ("FOIA"). See OIP Op. Ltr. No. 91-25 at 4 (Dec. 11, 1991), quoting U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989).

> **§92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and copying during regular business hours:
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> . . . .
>
> (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. 1991) and Act 185, 1992 Haw. Sess. Laws ___.

The 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. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

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").[2] 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 the 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

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[2]The 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).

> Russel Nagata (II at 13) and Honolulu Managing Director Jeremy Harris (II 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 . . . . 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).

Because the HVB Contract is the instrument by which the State purchases the HVB's services to promote, market, and develop tourism on behalf of the State, we believe that the HVB Contract, including the attachments, constitutes "government purchasing information" within the meaning of section 92F-12(a) (3), Hawaii Revised Statutes.[3]

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[3]It might be argued that the HVB Contract must be publicly available under section 92F-12(a) (10), Hawaii Revised Statutes, which requires the public availability of the contracts of "contract hires" employed by an agency. However, in OIP Opinion Letter No. 91-31 (Dec. 30, 1991), we concluded that the term "contract hire" was intended to apply only to those persons who are exempt from the civil service recruitment procedures of chapter 76, Hawaii Revised Statutes, under section 76-16(2), Hawaii Revised Statutes.

In OIP Opinion Letter No. 91-14 (August 28, 1991), we concluded that the phrase "except to the extent prohibited by section 92F-13," set forth in section 92F-12(a)(3), Hawaii Revised Statutes, was intended by the Legislature to permit agencies to withhold government records protected by the UIPA's "frustration of a legitimate government function" exception, set forth in section 92F-13(3), Hawaii Revised Statutes. See OIP Op. Ltr. No. 91-14 at 6-8. Specifically, we noted that the legislative history of this UIPA exception indicates that the Legislature believed that the disclosure of certain government purchasing information may result in the frustration of a legitimate government function.[4]

Accordingly, we must examine whether any of the information contained in Attachment Nos. 1 through 4 of the HVB Contract constitutes "confidential commercial and financial information" or "trade secrets" that must remain confidential in order to avoid the frustration of a legitimate government function under the UIPA.

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[4]Senate Standing Committee Report No. 2580, dated March 31, 1988 states:

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

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

III. CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION

In several OIP opinion letters, we have found guidance in case law applying Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. □ 552(b)(4) (1988) ("FOIA") in determining whether information constitutes "confidential commercial and financial information." See, e.g., OIP Op. Ltr. No. 89-5 (Nov. 20, 1989); OIP Op. Ltr. No. 90-3 (Jan. 18, 1990); OIP Op. Ltr. No. 90-21 at 11 (June 20, 1990); OIP Op. Ltr. No. 91-21 (Nov. 21, 1991); and OIP Op. Ltr. No. 91-29 (Dec. 26, 1991).

Case law under Exemption 4 of FOIA has established the following test to determine whether commercial and financial information is "confidential":

> Commercial or financial information is "confidential" for purposes of this exemption if disclosure is likely to have either of the following effects: (1) 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.

OIP Op. Ltr. No. 89-5 (Nov. 20, 1989); OIP Op. Ltr. No. 90-3 (Jan. 18, 1990); OIP Op. Ltr. No. 90-21 at 11 (June 20, 1990); quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) ("National Parks"). Thus, we must determine whether the HVB Contract attachments satisfy either prong of the above two-part test.

A. Impairment of Government's Ability to Necessary Information

To successfully invoke the "impairment prong" of FOIA's Exemption 4, the government agency must generally be able to demonstrate that the information was provided voluntarily, and that the submitting entity would not have provided the information if it had believed that the material would be subject to public disclosure. Protection under the "impairment prong" of Exemption 4, however, has been denied where participation of the information submitter in a program (i.e., bidding on a government contract) is technically voluntarily, yet submission of the information is actually mandatory if the submitter wishes to enjoy the benefits of participation. See OIP Op. Ltr. No. 91-16 at 11 (Sept. 19, 1991) and cases cited therein.

In our opinion, the public disclosure of the attachments to the HVB Contract will not impair DBED's ability to obtain similar information from the HVB in the future. Given the significant proportion of the HVB's operating budget that is derived from public appropriations, we do not believe that the HVB would refuse: (1) to enter into agreements with the State to provide services; or (2) to provide the State with similar information in the future, if the attachments to the HVB Contract are made available for public inspection and copying.

B.Substantial Competitive Harm

In determining whether the disclosure of information in the attachments to the HVB Contract is likely to cause substantial competitive harm to the HVB, we note that under FOIA's Exemption 4, federal courts have held that actual competitive harm need not be demonstrated. Rather, "evidence of `actual competition' and a likelihood of substantial competitive injury" is all that need be shown. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert denied, 485 U.S. 977 (1988) (emphasis added).

Importantly, however, where a commercial information submitter does not face any competition in the first place--for example where a contract is not awarded competitively, but rather is always awarded to a single company--the threshold requirement for the "competitive harm prong" protection of the information is lacking, and the information cannot be withheld under a competitive harm theory. See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) . In this regard, we observe that the HVB Contract is not awarded competitively by DBED, see section 201-95, Hawaii Revised Statutes, and that its operations have been funded by the State Legislature since 1903. See generally, Legislative Auditor's Report at 29-33.

Additionally, FOIA's Exemption 4 has been held not to apply to general or mundane information about an entity, or to information that is publicly available through other sources. See e.g., Anderson v. HHS, 907 F.2d 936, 952 (1Oth Cir. 1990). Based upon our examination of the attachments to the HVB Contract, it is our opinion that the portion of Attachment No. 1 containing HVB's marketing plan and Attachment Nos. 2 and 3 contain largely general information concerning HVB operations, and not detailed information about the HVB's assets, losses, market shares, selling prices, purchase activity, profit margins, etc., data commonly found protected under Exemption 4. See, e.g., National Parks, 547 F.2d at 684; Gulf & Western

Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976).

While the budget information in Attachment Number 1 to the HVB Contract does contain detailed information about the HVB's income and administrative costs and expenses, much of the information contained in this contract attachment is publicly available from other sources, including under federal law. For example, under section 6014 (e) of the Internal Revenue Code, the HVB must make a copy of its annual return filed under section 6033 of the Internal Revenue Code available for inspection during regular business hours at its principal place of business. Section 6033 of the Internal Revenue Code requires organizations exempt from taxation to file an annual return "stating specifically the items of gross income, receipts, and disbursements," as well as other detailed information prescribed by regulations adopted by the Secretary of the Treasury.[5] A blank copy of IRS Form 990 is attached to this opinion as Exhibit "A." Additionally, very similar information concerning the HVB's budget and expenditures appears throughout the Legislative Auditor's Report.

For the foregoing reasons, we conclude that information contained in Attachments Nos. 1-4 of the HVB Contract does not constitute "confidential commercial and financial information"

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[5]I.R.S. Notice 88-120, 1988-48 I.R.B. 10, further explains:

> The required disclosure of the annual return applies to an exact copy of the original Form 990 and all schedules and attachments filed with the Internal Revenue Service except that the required disclosure does not include the names and addresses of contributors to the organization. For example, the required disclosure must include Schedule A of Form 990 containing supplementary information on section 501(c) organizations. Specifically, therefore, the compensation information required in Part VI of Form 990 and parts I and II of Schedule A attached to Form 990, and any attachments and amendments, must be made available for public inspection.

that must remain confidential in order to avoid the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

IV. TRADE SECRETS

In his letter to the Deputy Director of Tourism dated March 12, 1992, HVB's legal counsel asserts that information in Attachment Nos. 1-4 of the HVB Contract constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 482B, Hawaii Revised Statutes.

Under the UIPA's "frustration of a legitimate government function" exception, agencies are not required to disclose information that is a "trade secret." See S. Stand. Comm. Report No. 2580, 14th Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988). Under the Uniform Trade Secrets Act, the term "trade secret" is defined as follows:

> `Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> 1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> 2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Haw. Rev. Stat. □482B-2 (Supp. 1991) (emphases added).

Chapter 482B, Hawaii Revised Statutes is modeled upon the Uniform Trade Secrets Act ("UTSA"), as amended in 1985, approved by the National Conference of Commissioners on Uniforms State Laws.[6] The commentary to section 1 of the UTSA provides significant guidance in determining what qualifies and what does not qualify for "trade secret" status:

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[6]Section 1-24, Hawaii Revised Statutes, provides that "[a] ll provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them."

> The definition of `trade secret' contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be `continuously used in one's business.' The broader definition in the proposed Act extends protection to a plaintiff who has not yet had the opportunity or acquired the means to put a trade secret to use. The definition included information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will **not** work could be of great value to a competitor.
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> . . . .
>
> The words `method, technique' are intended to include the concept of `knowhow.'
>
> The language `not being generally known to and not being readily ascertainable by proper means by other persons' does not require that information be generally known to the public for trade secret rights to be lost. If the principal persons who can obtain economic benefit from information are aware of it, there is no trade secret. A method of casting metal, for example, may be unknown to the general public but readily known within the industry.
>
> Information is readily ascertainable if it is available in trade journals, reference books, or published materials. Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. A person who discovers the trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering.
>
> Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on `need to know basis', and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.

Uniform Trade Secrets Act □1 Commentary (1985) (boldface in original, emphases added).

Under the UTSA, the person alleging the existence of a trade secret has the burden of establishing the person's claim. See Dionne v. Southeast Foam Converting, 397 S.E.2d 110, 113 (Va. 1990) . Additionally, in states that have adopted the UTSA, courts continue to resort to the Restatement of Torts' list of factors for guidance in determining whether particular information constitutes a trade secret. See Optics Graphics v. Agee, 591 A.2d 578 (Md. 1991); Minuteman, Inc. v. Alexander, 434 N.W.2d 773 (Wis. 1989); Electro-Craft Corp. v. Controlled Motion, 332 N.W.2d 890 (Minn. 1983); Network Telecommunications v. Boor-Crepeau, 790 P.2d 901 (Colo. Ct. App. 1990) . The Restatement of Torts indicates that the following factors should be considered in determining whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts □757 comment b (1939).

In applying the above factors to the HVB's conclusory allegation that the HVB Contract attachments constitute "trade secrets," we do not believe that a court would find that the HVB has made a sufficient showing that it has undertaken reasonable efforts to maintain the secrecy of the information. See, e.g., Electro-Craft Corp., 332 N.W.2d at 901 (more than minimal secrecy precautions required); Colorado Supply Co., Inc. v. Stewart, 797 P.2d 1303, 1306 (Colo. Ct. App. 1990) (precautions taken to protect secrecy "were only normal business precautions"); Network Telecommunications, 790 P.2d at 902 (reasonable efforts include advising employees as to existence of trade secret, limiting access to a trade secret on a "need-to-know" basis, and controlling plant access).

The HVB has made no showing that: (1) access to the information in the HVB Contract attachments is limited to a few HVB officers or employees on a "need-to-know" basis; (2) the HVB has required any employee to execute a non-disclosure agreement; or (3) the HVB has taken other similar reasonable measures to

guard the secrecy of the information contained in Attachments 1 through 4. None of the Attachments contain any propriety markings or indication that the information is considered to be a "trade secret" of the HVB. Similarly, we doubt that a court would find Attachment Number 2 entitled "HVB Financial Policies and Procedures" to be a trade secret since much of the information in this attachment consists of expenditure restrictions placed upon the HVB by the State.

Likewise, we find it difficult to believe that a court would find Attachment Number 3, the HVB's employee handbook, to be a protected trade secret when copies of the same are presumably provided to all HVB employees.[7] Additionally, we do not believe that a court would find the HVB's marketing plan for fiscal years 1991 and 1992 to be a protected trade secret because, in our opinion, much of the information in this HVB Contract attachment is either already publicly available or well known within the tourism industry. See, e.g., Optics Graphics, 591 A.2d at 585 (plaintiff's market strategy found discernible by market place inquiries).

Accordingly, we do not believe that a court would find the information in these contract attachments to be a "trade secret" under Hawaii's UTSA. Therefore, except as noted below with respect to HVB employee salaries, it is our opinion that the HVB Contract attachments should be made available for public inspection and copying under the UIPA.

However, we recommend that before it makes the HVB Contract attachments available for public inspection and copying, DBED notify the HVB of its intention to permit public inspection and copying of the contract to allow the HVB to seek and obtain injunctive relief, as provided under the UTSA, restraining DBED from disclosing the contract attachments. We suggest that DBED give the HVB a reasonable period of time, not to exceed 14 days, to seek a restraining order, before making the contract attachments available for public inspection and copying.

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[7]The HVB employee handbook contains an employee acknowledgement that the employee has been provided with a copy of the handbook.

V. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY.

A. HVB'S Privacy Interests

The HVB's legal counsel asserts that the disclosure of the attachments to the HVB Contract would constitute an invasion of the HVB's corporate "right to privacy." In previous OIP opinion letters, however, we concluded that under the UIPA, corporations do not have cognizable "privacy interests." See OIP Op. Ltr. No. 89-1 (Sept. 11, 1989); OIP Op. Ltr. No. 89-5 (Nov. 29, 1989); OIP Op. Ltr. No. 89-13 (Dec. 12, 1989); OIP Op. Ltr. No. 91-21 (Nov. 29, 1991); and OIP Op. Ltr. No. 91-27 (Dec. 12, 1991).

Specifically, in these opinion letters, we noted that the UIPA states "[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 interest of the individual." Haw. Rev. Stat. □92F-14(a) (Supp. 1991) (emphasis added); see also Haw. Rev. Stat. □92F-2 (Supp. 1991) (purpose of UIPA is to "[b] alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy"). Under the UIPA, the term "individual" means "a natural person." Haw. Rev. Stat. □92F-3 (Supp. 1991).

Moreover, other authorities that have expressly considered the issue have concluded that fictional entities, such as corporations or associations, do not have constitutionally protected privacy interests. See Roberts v. Gulf Oil Corp., 195 Cal. Rptr. 393 (Cal. Ct. App. 1983) (California's constitutional privacy provision "protects the rights of the people" not fictional entities such as corporations) (emphasis in original); Health Central v. Commissioner of Insurance, 393 N.W. 625 (Mich. Ct. App. 1986) ("[i] t is clear that corporations do not enjoy a right to privacy"); see also McCloskey v. Honolulu Police Dep't., 71 Haw. 568, 574 (1990) (right to privacy protects "individual's interest in avoiding disclosure of personal matters" and "his or her interest in freely making certain kinds of important personal decisions").

Consistent with previous OIP opinion letters, and the authorities set forth above, we conclude that the HVB does not have a personal privacy interest recognized by the UIPA and, thus, disclosure of the attachments to the HVB Contract would not constitute "a clearly unwarranted invasion" of the HVB's personal privacy.

B. Privacy Interests of HVB Officers and Employees

In his letter to the Deputy Director for Tourism dated March 12, 1992, the HVB's legal counsel asserts that the disclosure of Attachment Number 4 to the HVB Contract, which is entitled "Position and Pay Schedule," would constitute "a clearly unwarranted invasion of personal privacy" of the HVB employees identified in the schedule, and that under section 92F-13(1), Hawaii Revised Statutes, this document is protected from public disclosure.

As part of the UIPA, the Legislature included express provisions concerning the disclosure of information concerning the compensation paid to present or former government agency officers or employees. Specifically, section 92F-12(a) (14), Hawaii Revised Statutes, requires the public availability of the compensation paid to present or former agency officers or employees, "but only the salary range for employees covered by or included in chapters 76, 77, 297 or bargaining unit (8) ."

The UIPA's provisions concerning the availability of compensation paid to government employees stem largely from the recommendations of the Governor's Committee. On this point, the Governor's Committee Report provides:

> The information which attracted the most attention was the **salaries and compensation of public employees.** There was strong sentiment that more information in this area would be available . . . . As was expressed by one Committee member, the public has the right to know what public employees are making, at least in part, to judge whether it is worth the expense.
>
> One way to handle this would simply be to provide that the salary or compensation paid to an employee is public. There are, however, alternatives. If the focus is the salaries of appointed or high level positions, and that appeared to be the case from much of the testimony and comment, then perhaps the formula should allow the specific salaries of most employees to be confidential while providing the information which is more important. For example, providing the actual salaries of all "exempt and/or excluded employees" would mean that the salaries of all appointed

> positions and all managerial positions would be public. That could be supplemented by providing the "salary ranges" for all other employees. For example, a Clerk-Typist II is in Salary Range 8 and, therefore, has under the current contract a salary of $13,260 to $20,040 a year depending on seniority.

Vol. I Governor's Committee Report 109 (1987) (boldface in original, emphases added).

Based upon the legislative backdrop set forth in the Governor's Committee Report, we believe that in adopting section 92F-12(a) (14), Hawaii Revised Statutes, the Legislature intended to require the public availability of compensation information concerning individuals who are publicly employed in State or county executive, legislative or judicial branch government agencies, not the availability of the salaries of employees employed in corporations who may be providing services to the government under contract, or acting on its behalf.

Because HVB officers and employees are not "public employees" but rather are employed by a private, tax-exempt corporation,[8] in accordance with general UIPA principles, we must turn to an examination of whether the disclosure of their salaries would be a clearly unwarranted invasion of personal privacy, and thereby protected from disclosure under section 92F-13(1), Hawaii Revised Statutes.

The UIPA states that the "[dl 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. 1991). Under this balancing test, "if a privacy interest is not `significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly

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8A future opinion letter to be issued by the OIP will examine whether the HVB is an "agency" under the UIPA. Specifically, we shall examine whether the HVB is a "corporation or other establishment owned, operated, or managed by or on behalf of this State." Haw. Rev. Stat. □ 92F-3 (Supp. 1991).

unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates that this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a significant privacy interest. Subsection (b) of section 92F-14, Hawaii Revised Statutes, provides in pertinent part:

> (b) The following are examples of information in which the individual has a significant privacy interest:
>
> . . . .
>
> (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness; . . . .

Haw. Rev. Stat. □92F-14 (b) (6) (Supp. 1991) (emphases added).

Based upon section 92F-14(b) (6), Hawaii Revised Statutes, we find that HVB officers and employees have a significant privacy interest in information concerning their income. We now turn to a balancing of that privacy interest against the public interest in disclosure to determine whether the public disclosure of this information would constitute a clearly unwarranted invasion of personal privacy. See Haw. Rev. Stat. □92F-14 (a) (Supp. 1991).

In previous OIP advisory opinions, we concluded that the "public interest" to be considered under the UIPA's balancing test is the public interest in the disclosure of "[o] fficial information that sheds light on an agency's performance of its statutory purpose," see OIP Opinion Letter No. 90-7 (Feb. 9, 1990), and in information which sheds light upon the conduct of government officials, see OIP Opinion Letter No. 90-17 (Apr. 24, 1990) . Two of the basic policies served by the UIPA are to "[p] romote the public interest in disclosure" and to

"[e] nhance governmental accountability through a general policy of access to government records." See Haw. Rev. Stat. □92F-2 (Supp. 1991) . Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. □92F-2 (Supp. 1991).

In contrast, however, in previous OIP advisory opinions, we reasoned that this "public interest," in the usual case, is "not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about any agency's own conduct." OIP Op. Ltr. No. 89-16 (Dec. 27, 1989), quoting, U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

Applying the above principles to Attachment Number 4 of the HVB Contract, we believe that while the disclosure of the salaries paid to all HVB employees would, to some degree, advance the UIPA's policy of promoting governmental accountability, the disclosure of this information reveals little, if anything, concerning the activities of a government agency. Rather, the disclosure of this information primarily sheds light upon the incomes paid to the employees of a private, tax-exempt Hawaii corporation that is providing services to the government under contract with the State.

While we recognize that most HVB employees are paid in whole or in part by funds paid by State taxpayers, the UIPA's policy of promoting governmental accountability can be advanced equally as well by the DBED's disclosure of Attachment No. 4 after any information that would likely result in actual identification of individual HVB employees has been segregated from the attachment. In this manner, the significant privacy interest of HVB employees recognized by section 92F-14(b) (6), Hawaii Revised Statutes, is protected, while, at the same time, the public interest in disclosure is safeguarded by the disclosure of information about HVB salaries, severed of identifying information.

Accordingly, we believe that, on balance, under section 92F-14(a), Hawaii Revised Statutes, the significant privacy interest of HVB employees in their incomes is not outweighed by the public interest in disclosure of this information.

However, as noted earlier in this opinion, under section 6014(e) of the Internal Revenue Code, the HVB must permit the public to inspect its annual return under section 6033 of the Internal Revenue Code. Part V of the IRS Form 990, "Return of Organization Exempt from Income Tax," requires the HVB to disclose the compensation paid to certain officers, directors, or trustees. See Exhibit "A." Because this information is publicly available under federal law, in our opinion, the disclosure of the compensation paid to HVB officers or directors listed on its annual tax return would not constitute "a clearly unwarranted invasion of personal privacy" under the UIPA.

CONCLUSION

Based upon the legal authorities and principles set forth above, it is the opinion of the OIP that the HVB Contract and attachments constitute "government record[s]" under the UIPA, and, except for individually identifiable information about certain HVB employees' salaries contained in Attachment No. 4, they must be made available for public inspection and copying during regular business hours.

Very truly yours,

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