

August 30, 1994

Mr. John A. Broussard
P.O. Box 4584
Kawaihae, Hawaii 96743

Dear Mr. Broussard:

Re: Grant Application of Ka'ili'ula Ohana Corporation

This is in response to your letter to the Office of Information Practices ("OIP") dated March 24, 1993, concerning the public's right to inspect and copy an application filed by the Ka'ili'ula Ohana Corporation ("KOC") to receive a monetary grant from the Community-Based Economic Development ("CBED") Program administered by the State Department of Business, Economic Development, and Tourism ("DBEDT").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the grant application filed by the KOC to receive a monetary grant under the CBED program must be made available for public inspection and copying upon request.

BRIEF ANSWER

Yes. Under section 92F-14(a)(5) and (6), Hawaii Revised Statutes, individuals have a significant privacy interest in information concerning their financial activities, income, and nongovernmental employment history. KOC's grant application contains information concerning the salaries of two of its employees, as well as brief synopses of the duties and qualifications of four of its employees. Although we realize that these individuals may have a significant privacy interest in their salaries, we find it significant that these two salaries are paid entirely with CBED funds, and we believe that there is a substantial public interest in the disclosure of information concerning the expenditure of taxpayers' money in the CBED program. Further, the disclosure of the grant application would shed significant light upon the DBEDT's decisions and actions in

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awarding government funding. Accordingly, we believe that the public interest in disclosure outweighs the privacy interests of the KOC employees, and the disclosure of the grant application would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

In previous OIP advisory opinions, the OIP has concluded that "confidential commercial and financial information" is an example of information protected by the UIPA's "frustration of a legitimate government function" exception. In order to constitute "confidential commercial and financial information," the disclosure of the information must either "impair the [g]overnment's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

The impairment prong of the National Parks test does not generally apply to information that must be submitted to an agency as a condition of participating in an agency program. To receive CBED program funding, KOC is required to provide the information requested in the grant application. Thus, the first prong of the National Parks test does not apply. Also, because KOC stated in its grant application that its subscription farming program will be the first such program in the Ka'u region, it does not appear that KOC faces actual competition and that the disclosure of the grant application would cause substantial competitive injury to KOC. Accordingly, we do not believe that KOC's grant application constitutes "confidential commercial and financial information" protected under section 92F-13(3), Hawaii Revised Statutes.

Because none of the other UIPA exceptions apply to protect KOC's grant application from disclosure, we conclude that it must be made available for public inspection and copying upon request.

FACTS

DBEDT administers the CBED Program under chapter 210D, Hawaii Revised Statutes. Section 210D-1, Hawaii Revised Statutes, states that the purpose of the CBED Program is to "financially assist the establishment and development of traditional and small community-based enterprises in the State" through a program of loans and grants.

KOC filed its application for a CBED Program grant on March 5, 1992. In an agreement between DBED and KOC dated November 7, 1992, KOC received a \$40,000.00 grant from the CBED Program.

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KOC's application states that the funds from the grant will be used to create a short-term economic transformation of the Ka'u region through a program that increases local self reliance and productivity of area farms and forest stewardship practices. As part of its plans, KOC states in its application that it will initiate a community subscription farming program ("program") in which produce and forest products are raised by and sold to program participants.

The grant application filed by KOC consists of seven sections:

- I. Community Profile;
- II. Organizational History and Accomplishments;
- III. Management and Structure;
- IV. Community Representation, Participation and Empowerment;
- V. Project Description and Workplan;
- VI. Staffing, Budget and Resource Development; and
- VII. Budget Item Justifications.

Sections I through VI of the grant application contain responses written in paragraph form to specific questions asked about the grantee. Section VI also contains brief synopses of the duties and qualifications of four employees of the KOC: (1) the project director/training coordinator; (2) the administrator/marketing coordinator; (3) the agroforestry technical expert and instructor; and (4) the video consultant. Section VI also contains a budget with two columns: one column indicates planned expenditures of CBED funds, which includes the exact salaries for the project director/training coordinator position and the administrator/marketing coordinator position; the other column reveals the planned expenditures of in-house funds and other funding sources not obtained from CBED. Finally, section VII of the grant application contains brief descriptions of some of the budget items listed in section VI.

On March 4, 1993, you requested DBEDT to provide you with a copy of KOC's grant application. However, you were informed that DBEDT would only provide you with a summary and not the actual grant application filed by KOC. Your letter dated March 24, 1993 to the OIP requested an advisory opinion concerning the public's right to inspect and copy grant applications filed with DBEDT.

DISCUSSION

I. INTRODUCTION

The UIPA generally provides that "[a]ll government records

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are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). Unless one of the UIPA exceptions contained in section 92F-13, Hawaii Revised Statutes, permits an agency to withhold the requested information, "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. 1992).

In reviewing the five UIPA exceptions contained in section 92F-13, Hawaii Revised Statutes, we find that only two of the UIPA exceptions might be applicable to portions of the KOC application. We shall examine each of these UIPA exceptions separately.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The UIPA's exception for personal privacy is contained in section 92F-13(1), Hawaii Revised Statutes. Under this UIPA exception, agencies are not required to disclose government records, which, if disclosed, would "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992). Further clarification of this exception is provided in section 92F-14(a), Hawaii Revised Statutes, which provides 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."¹

In previous advisory opinions applying the UIPA's balancing test, we have found that the public interest to be considered is the "disclosure of official information that sheds light on an agency's performance of its statutory purpose" and "information which sheds light upon the conduct of government officials." See OIP Op. Ltr. No. 93-1 at 8 (April 8, 1993) and authorities cited therein.

¹The legislative history of the UIPA also informs us that "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not 'significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). See also Haw. Rev. Stat. § 92F-2 (Supp. 1992).

Examples of information in which an individual has a significant privacy interest are contained in section 92F-14(b), Hawaii Revised Statutes. Section 92F-14(b), Hawaii Revised Statutes, states in pertinent part:

(b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(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)(5) and (6) (Supp. 1992) (emphases added).

In light of sections 92F-14(b)(5) and (6), Hawaii Revised Statutes, we are specifically concerned with the disclosure in section VI of the KOC application of the salary information and the brief synopses of the qualifications of the identified KOC employees.

We note that none of the identified KOC employees are applying for a "government position" within the meaning of section 92F-14(b)(5), Hawaii Revised Statutes. Also, under the UIPA, an individual has a significant privacy interest in information describing that individual's income. Thus, we believe that, under section 92F-14(b)(5) and (6), Hawaii Revised Statutes, the KOC employees identified in the grant application have a significant privacy interest in their employment history and salary data. See OIP Op. Ltr. No. 92-17 (Sept. 2, 1992) (Hawaii Visitors Bureau employees possess a significant privacy interest in information concerning their salaries).

A previous advisory opinion, which was based on facts analogous to those presented in this case, provides significant guidance in determining whether the disclosure of the above information would constitute a clearly unwarranted invasion of personal privacy. In OIP Opinion Letter No. 90-21 (June 20, 1990), we examined whether information contained in an audit

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report which revealed the salaries, educational history, and qualifications of certain employees of the Protection and Advocacy Agency of Hawaii ("P&A"), a nongovernmental agency receiving State funding, should be made available for public inspection and copying under the UIPA.

Although the opinion assumed that these P&A employees had a significant privacy interest in their salaries and qualifications, the OIP found that because the P&A received over 97% of its revenue in the form of State and federal grants, there was a substantial public interest in the disclosure of information concerning the P&A's expenditure of these public funds. The OIP also found that other provisions of the UIPA evidence the substantial public interest in the disclosure of information regarding the expenditure of public funds. See OIP Op. Ltr. No. 90-21 at 17. Further, the OIP found a significant public interest in information concerning the P&A's compliance, or non-compliance, with its contract with the State.

In balancing the significant privacy interests of the P&A employees against the substantial public interest in disclosure, the OIP found, in OIP Opinion Letter No. 90-21, that the public interest in disclosure outweighed the privacy interests of the employees, and found that the audit report should be made available for public inspection and copying under the UIPA.

In OIP Opinion Letter No. 92-17 (Sept. 2, 1992), however, the OIP found that employees' names and identifying information should be segregated from the salary information contained in a Hawaii Visitors' Bureau ("HVB") contract attachment. Although the HVB receives 90% of its funding from the State, the contract attachment in question listed the names, job titles, and exact salaries of all HVB employees, including those whose salaries were paid using private funds or a mix of both public and private funds. Consequently, after balancing the public interest in disclosure and the privacy interests of the HVB employees, the OIP concluded that segregation of the names of HVB employees from the contract attachment best accommodated HVB employees' privacy interests and the public interest in learning how taxpayers' funds were being spent.

In the KOC grant application, the budget reveals the exact salaries of two KOC positions, both of which are paid entirely by CBED funds. Although the names of the employees holding these positions are not revealed in the budget, their names, job titles, and a brief synopsis of their backgrounds are listed elsewhere in the grant application. Consequently, it is a simple matter to match the names and job titles of the employees to the job titles and exact salaries for these two CBED-funded

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positions.

While we believe that the public interest is not fostered by the disclosure of information about private citizens that sheds little or no light upon the actions or decisions of government agencies, see OIP Opinion Letter No. 92-17 at 22, we are not presented with such a case here. Rather, here we are presented with information about salaries paid entirely by a grant of public funds from a government agency. Thus, we believe that the facts presented here are more analogous to the facts presented in OIP Opinion Letter No. 90-21. Like the audit report which identified only certain P&A employees and their salaries, the budget in the KOC grant application only reveals the salaries of two KOC employees whose salaries are paid entirely by CBED funds.

Because there is a great public interest in the disclosure of information that sheds light upon the expenditure of taxpayer funds, and we believe that this public interest outweighs the privacy interests of the two employees whose salaries are listed in the KOC grant application budget, we do not believe that disclosure of this salary information would result in a clearly unwarranted invasion of personal privacy under the UIPA.

We now turn to examine the UIPA's "frustration of a legitimate government function" exception.

III. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Section 92F-13(3), Hawaii Revised Statutes, states that agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." In the legislative history of the UIPA, the Legislature provided several examples of the types of information that would, if disclosed, result in the "frustration of a legitimate government function." One of the examples given covers "[t]rade secrets or confidential commercial and financial information." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

The federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), also contains an exemption which permits federal agencies to withhold "confidential commercial and financial information." 5 U.S.C. § 552(b)(4) (1988). We have previously examined and applied cases interpreting FOIA's Exemption 4 in determining whether information submitted to government agencies constitutes "confidential commercial and financial information" protected under the UIPA's "frustration of a legitimate government function" exception.

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The federal courts have not experienced difficulty interpreting the terms "commercial" and "financial" in Exemption 4. In general, as long as the submitter has a commercial interest in the information, it will be considered "commercial" or "financial" information for Exemption 4 purposes. Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982). However, this commercial or financial information must also be "confidential" in order to be withheld under Exemption 4.

In National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the D.C. Circuit Court of Appeals upheld the district court's decision that the balance sheet of a park's concessioner is protected under FOIA's Exemption 4 as "confidential commercial and financial information" because the disclosure of the information on the balance sheet would likely result in substantial competitive harm to the concessioner. The court set forth a two-part test for determining whether commercial or financial information is "confidential" for purposes of Exemption 4:

[C]ommercial or financial matter is 'confidential' for purposes of the exemption 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 at 770.

Applying the first part of the National Parks test to the facts at hand, we note that grant applicants must provide information concerning their organization to DBEDT if they wish to receive government funding.² Hence, the disclosure of a

²In Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 880 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals held that the National Parks two-prong test is confined to financial or commercial information that a person is required to furnish the Government. Thus, "Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis if it is of a kind that the provider would not customarily release to the public." Id. Regarding a submitter's voluntary participation in an activity such as applying for a grant or a loan, the U.S. Department of Justice, Office of Information and Privacy, has advised that agencies should focus on whether submission of the information is

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grantee's application would not impair DBEDT's "ability to obtain necessary information in the future." See Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Badhwar v. Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (no impairment when submission is required if submitter is to do business with the government); Racal-Milgo Gov't Sys. v. SBA, 558 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

As for the second prong of the National Parks test, courts have held that the "competitive harm" prong of Exemption 4 does not require an organization to prove actual competitive harm. Rather, evidence of "actual competition and a likelihood of substantial competitive injury" is all that is required. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987).

KOC stated in its application that, upon receiving CBED funding, KOC would establish the first subscription farming program in the Ka'u region. Because there are no other organizations offering subscription farming programs in the Ka'u region, it does not appear that KOC faces actual competition or that there is a likelihood of substantial competitive injury should KOC's grant application be made publicly available. Nor has any party demonstrated the same. Accordingly, we conclude that KOC's grant application does not constitute "confidential commercial and financial information" protected under the UIPA's frustration of a legitimate government function exception, and this record must be made available for public inspection and copying upon request.

CONCLUSION

Although individuals have a significant privacy interest in information concerning their income and non-governmental employment history, see section 92F-14(a)(5) and (6), Hawaii

(..continued)

required for those choosing to participate in the activity. Office of Information and Privacy, U.S. Dep't of Justice, FOIA Update, Vol. XIV, No. 3 (Summer 1993). Accordingly, because KOC is required to provide its financial information to the government in order to receive grant funding, we believe that the National Parks two-prong test applies to determine whether its financial information constitutes "confidential commercial and financial information."

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Revised Statutes, we believe that, based upon the facts presented here, the public interest in disclosure outweighs the privacy interests of the KOC employees. Consequently, under section 92F-14(a), Hawaii Revised Statutes, the UIPA's personal privacy exception does not protect those portions of KOC's grant application which disclose the salaries received by two KOC employees and the brief synopses of four KOC employees' educational and training background, and their previous work experience.

Moreover, we conclude that KOC's grant application does not constitute "confidential commercial and financial information" because it does not appear that KOC faces actual competition or that disclosure of the grant application would result in the "likelihood of substantial competitive injury." Thus, the UIPA's "frustration of a legitimate government function" exception also does not apply to protect the KOC grant application from disclosure.

Very truly yours,

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APPROVED:

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SML:sc

c: The Honorable Jeanne K. Schultz
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