

September 20, 1994

Mr. Alan S. Hayashi
Executive Director
Convention Center Authority
Davies Pacific Center
841 Bishop Street, Suite 2222
Honolulu, Hawaii 96813

Dear Mr. Hayashi:

Re: Disclosure of Point Tabulation Sheets/Quality Points Awarded
to State Convention Center Design/Build Proposals

This is in reply to your letter to the Office of Information Practices ("OIP") dated September 6, 1994. You requested the OIP to provide you with an advisory opinion concerning whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Convention Center Authority ("CCA") must publicly disclose the quality points, or evaluation scores, awarded by two CCA evaluation boards to the four design/build proposals for the construction of a State convention center.

In a telefax to the OIP dated September 6, 1994, Desmond Byrne, Chairperson of Common Cause Hawaii, also requested the OIP to issue an advisory opinion concerning the disclosure of the evaluation scores awarded to the State convention center design/build proposals and the rating sheets containing those scores.

ISSUE PRESENTED

Whether, under the UIPA, the CCA must make available for public inspection and copying the "Point Tabulation Sheets" containing the quality points, or evaluation scores, awarded by two CCA evaluation boards to design/build proposals submitted by four design/build teams for the construction of a State convention center.

OIP Op. Ltr. No. 94-18

Mr. Alan S. Hayashi
September 20, 1994
Page 2

BRIEF ANSWER

We believe that the issue presented for our determination is reasonably debatable and that sound arguments can be made in favor of and against disclosure of the quality points, or evaluation scores, awarded to each convention center design/build team's proposal.

The UIPA clearly recognizes that there is a compelling public interest in the disclosure of government purchasing information and information concerning the expenditure of public funds. The UIPA's underlying policies promoting open government are at their apex when information concerning the expenditure of public monies are concerned.

In contrast, the pre-enactment history of the UIPA, and the legislative history of the "frustration of legitimate government function" exception in section 92F-13(3), Hawaii Revised Statutes, explicitly recognize that before a contract or agreement is let by an agency, the public disclosure of certain information could 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.

The UIPA's disclosure provisions exist to make government accountable to the public in the expenditure of public monies, and to shed light upon the actions and decisions of government agencies, while the "frustration of legitimate government function" exception exists, in part, to permit an agency to withhold information in order to obtain the most possible for the taxpayers' dollar during a procurement process. In the case before us, these two policies directly compete with one another.

In carefully considering these directly competing policies, for the reasons explained in detail below, we are constrained to conclude that the CCA has sustained its burden of demonstrating that the disclosure of the quality points or evaluation scores awarded by the CCA's Technical and Design Evaluation Boards could give one of the four design teams in negotiations with the State toward a final convention center development contract a manifestly unfair advantage, or raise the cost of government procurements. Both chapter 206X, Hawaii Revised Statutes, and the CCA's administrative rules contemplate a period of negotiations in reaching an agreement with the developer selected to design and build the State convention center.

Mr. Alan S. Hayashi
September 20, 1994
Page 3

It is the presence of these authorized contract negotiations which is a decisive factor in leading us to conclude that until the final execution of a development agreement or contract, the CCA may, but is not required to, withhold access to the quality points, or evaluation scores, of the Technical and Design Evaluation Boards in order to avoid the frustration of a legitimate government function.

Upon the execution of a convention center development agreement, it is our opinion that the disclosure of government records revealing the quality points, or evaluation scores, awarded to each of the four design/build proposals (such as Exhibits C through F) would no longer possibly result in the frustration of a legitimate government function. At such time, the CCA must disclose the completed Compiled Point Tabulation Sheets and Individual Point Tabulation Sheets of each evaluation board, and in keeping with the policies underlying the UIPA, the CCA's procurement process will be held to the light of public scrutiny. The public will then be armed with information that will permit it to evaluate the evaluators, and to scrutinize how the CCA decided to expend \$200 million in public funds.

FACTS

The development of a State convention center has been a subject of continuing public and legislative controversy. On December 3, 1993, the CCA entered into a binding agreement to purchase a 9.67 acre parcel, formerly known as the "Aloha Motors Site," as the location for the State convention center.

Under chapter 206X, Hawaii Revised Statutes, the CCA's purpose, among others, is to review for approval the proposed convention center development plan of a developer and to supervise the development by a developer of all development within the convention center district.

Section 206X-4(b)(21), Hawaii Revised Statutes, provides that the CCA:

- (21) By itself, or in combination or association with qualified persons, by any form of request for proposals, as determined by the authority, any law the contrary notwithstanding, solicit, accept, review, reject, modify, or

Mr. Alan S. Hayashi
September 20, 1994
Page 4

approve proposals, and thereafter enter into agreements, for a convention center development plan, and for the initiation, undertaking, supervision and regulation of the design, development, financing, operation and maintenance of a convention center facility and any related developments.

Haw. Rev. Stat. § 206X-4(b)(21) (Comp. 1993) (emphases added).

Section 15-107-11, Hawaii Administrative Rules ("HAR"), sets forth the process for the CCA's issuance of an RFP for the design and construction of a State convention center. It also authorizes negotiations between the CCA and the selected developer before the execution of a development agreement. Section 15-107-11(j), HAR, provides:

(j) As soon as practical following the completion of the review and evaluation process, the authority shall select a proposal and shall publicly announce the selection of the developer. Thereafter, the authority shall enter into negotiations with the selected developer for a convention center development plan and development agreement for the plan, and shall conclude their negotiations and execute a development agreement as set forth in subsection (1).

HAR § 15-107-11(j) (emphasis added).

The CCA's administrative rules also provide:

§15-106-11 Public access to records.
All government records of the Authority are open to public inspection during regular business hours unless public inspection of those records is contrary to state or federal law, or any court order.

HAR §15-106-11.¹

¹In previous opinion letters, we concluded that an agency, through rulemaking, cannot make confidential government records

Mr. Alan S. Hayashi
September 20, 1994
Page 5

On or about March 4, 1994, the CCA issued a "Convention Center Design/Build Request for Proposals" ("RFP"). During a pre-qualification review phase the qualifications of seven (7) design/build teams were reviewed. On or about April 15, 1994, the CCA selected the four (4) most qualified design/build teams and invited them to submit their proposals by August 5, 1994.

On August 5, 1994, four design/build teams submitted technical proposals for the design and construction of a State convention center. These proposals consisted of a scale model, plans, schematics, specifications, and a ten million dollar Proposal Guaranty Bond. According to the CCA, each of the four design proposals met the minimum requirements of the RFP, and each proposed to design and construct a State convention center for the cost of 200 million dollars.

During the period of August 5 through August 31, 1994, information concerning the four design/build proposals was made available for public review and comment, and several public presentations were made by each of the four design/build teams. After the August 5, 1994 submission deadline, each of the design/build proposals were subject to independent evaluation and scoring by a CCA Technical Evaluation Board and a CCA Design Evaluation Board. Section 3.1.5 of Volume I of the RFP provides:

3.1.5 **QUALITY POINT.** Points will be assigned according to maximums for each category in the following table.

CATEGORY	TOTAL POINTS
Technical Evaluation-Phase II	750
Design Evaluation-Phase III	250
TOTAL QUALITY POINTS	1,000

that are not protected by one of the exceptions in section 92F-13, Hawaii Revised Statutes. See OIP Op. Ltr. No. 92-3 at 12 (Mar. 19, 1992). As a result, in this opinion we shall examine whether the government records involved in the facts before us must be made available for public review under the UIPA. We believe the CCA's administrative rule is consistent with this policy.

Mr. Alan S. Hayashi
September 20, 1994
Page 6

The proposal with the highest Total Quality Points will be recommended to the Authority by the Technical and Evaluation Boards.

Section 3.1.10 through 3.1.11 of Volume I of the RFP describes the composition of the Technical and Design Evaluation Boards, and the technical and design evaluation criteria. See Exhibit A. Section 3.1.6 of Volume I of the RFP sets forth the rating system to be applied by each of the review boards. See Exhibit B.

Before commencing with the scoring of the design/build proposals, each evaluation board allocated the total quality points available to the technical evaluation (750 points) and the design evaluation (250 points) among the various evaluation criteria set forth in section 3.1.11 of the RFP. See Exhibit A. For example, of the 750 quality points allotted to the technical evaluation, 200 points were allotted to the category "Site Design," and these 200 points were further divided among the sub-categories under this evaluation criterion, such as "Site Organization and Planning" and "Building Accessibility," among others.

As for the mechanics of each evaluation board's scoring of the proposals, each member of each board separately assigned a percentage to each of evaluation criteria using the rating system set forth in Exhibit B. For example, a proposal receiving between 86 and 100 percent for a criterion will be deemed to present a "Superior Solution" in that the proposal exceeds programmed criteria. In contrast, a proposal receiving between 26 and 40 percent for a criteria is deemed to present a "Below Average Solution."

According to the CCA, the Design Evaluation Board and Technical Review Board independently scored the four design/build proposals. The percentages awarded by each member of each evaluation board were recorded on Point Tabulation Sheets ("Individual Point Tabulation Sheets"). Copies of the Individual Point Tabulation Sheets used by the Technical and Design Evaluation Boards to record the percentages awarded by individual evaluation board members are attached as Exhibits C and D respectively.

Then the percentages awarded by each evaluation board member

were compiled into one "Point Tabulation Sheet" for each board ("Compiled Point Tabulation Sheets"). These documents reflected the average percentages awarded for each of the evaluation criteria for each design/build team, and these average percentages were then converted into quality points in the manner described above. After the Design Evaluation Board completed its evaluations, the Technical Review Board provided the Design Evaluation Board with its Compiled Point Tabulation Sheet, and the Design Evaluation Board compiled the results of the scoring by both boards. Copies of the Compiled Point Tabulation Sheets used by the Technical and Design Evaluation Boards are attached as Exhibits E and F respectively. These reflect the final scores awarded by each evaluation boards.

Based upon the total quality points, both evaluation boards selected and recommended that design/build team D, Nordic/PCL, be selected to design and build the State convention center. According to the CCA, at a public meeting of the CCA on August 31, 1994, the CCA adopted the following motion:

1. That the Convention Center Authority select Design/Build Team D, Nordic/PCL to design and build the Hawaii Convention Center subject to the Authority, its staff and consultants finalizing the terms and conditions of the Convention Center Development Plan and the Design/Build Contract with Team D by October 31, 1994, unless the Authority determines that additional time is required;

. . . .

3. That if the Authority and Design/Build Team D fail to enter into a Design/Build Contract by October 31, 1994, or such additional time as the Authority deems necessary, or if the Authority determines that satisfactory progress is not being made toward a final contract, the Authority reserves the right to:

- a. Disqualify Design/Build Team D and select a new proposal from the remaining qualified proposals; or

Mr. Alan S. Hayashi
September 20, 1994
Page 8

- b. Disqualify Design/Build Team D and repeat the RFP process.

Letter from Alan Hayashi, Executive Director, CCA to Kathleen A. Callaghan, OIP Director, dated September 6, 1994 at 4-5.

Also on August 31, 1993, the CCA publicly announced that the CCA's Technical and Design Evaluation Boards unanimously selected the design/build proposal of Nordic/PCL. Following the CCA's public announcement of its selection of a convention center developer, several media organizations and Common Cause Hawaii made requests to inspect the evaluation and score sheets prepared by the CCA for each of the four design/build teams. The CCA refused to publicly disclose this information.

On September 1, 1994, the CCA through its Executive Director, and its special deputy attorney general, sought informal guidance from the OIP concerning whether, under the UIPA, it must disclose the evaluation scores awarded to the four design/build proposals. Due to the need to research the matter further, the OIP advised the CCA to request a formal opinion letter under section 92F-42(2), Hawaii Revised Statutes, and the CCA indicated it would do so.

On September 1, 1994, the CCA started contract negotiations with Nordic/PCL pursuant to section 15-107-11, Hawaii Administrative Rules. The CCA informs the OIP that it is anticipated that these negotiations may be concluded by September 30, 1994, however, under the CCA's rules, it has until October 31, 1994 to finalize a convention center development contract. On September 1 and 2, 1994, CCA engineers transmitted to Nordic/PCL numerous separate design changes that the CCA requested be made to Nordic/PCL's proposal at no additional cost to the State. At the request of the OIP, the CCA provided the OIP for its in camera review, a copy of the CCA's request to Nordic/PCL for the numerous design changes.

On September 2, 1994, Gannett Pacific Corporation, dba, The Honolulu Advertiser, and other television and print media organizations filed suit² against the CCA under section 92F-15,

²Gannett Pacific Corp., dba The Honolulu Advertiser, a Hawaii corporation; Liberty Newspapers Limited Partnership, dba Honolulu Star Bulletin; Burnham Broadcasting Company, dba KHON-TV, a

Mr. Alan S. Hayashi
September 20, 1994
Page 9

Hawaii Revised Statutes, alleging that the scores awarded to the design/build proposals are government records, and that the plaintiffs are persons aggrieved by the CCA's denial of access to these government records. On September 2, 1994, the Director of the OIP contacted Jeffrey S. Portnoy, the attorney for the media plaintiffs, and informed him that the CCA would be requesting an opinion from the OIP concerning its responsibility to disclose the evaluation scores awarded to the four design/build proposals.

By letter to the OIP dated September 6, 1994, the CCA requested the OIP to issue an opinion concerning the CCA's obligation to publicly disclose the evaluations scores awarded to the four design/build proposals submitted in response to the CCA's RFP. In this letter, the CCA asserted that under section 92F-13(3), Hawaii Revised Statutes, the CCA was authorized to withhold access to the evaluation scores awarded by the CCA's evaluation boards. Nevertheless, the CCA concedes that upon the final execution of a convention center development agreement, the quality points, or scores, awarded by the CCA's evaluation boards must be made available for public inspection and copying.

DISCUSSION

I. INTRODUCTION

A. Rules of Construction

Like the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), we believe that the UIPA was designed to: (1) "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989), and (2) "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see generally, Haw. Rev. Stat. § 92F-2 (Supp. 1992).

The UIPA explicitly sets forth the policy of conducting

Delaware corporation; TAK Communications, Inc., dba KITV4, a Maryland corporation; and KGMB, a division of Lee Enterprises, Inc., a Hawaii corporation v. Convention Center Authority, Civil No. 94-3365-09, Circuit Court for the First Circuit, State of Hawaii.

Mr. Alan S. Hayashi
September 20, 1994
Page 10

government business as openly as possible in section 92F-2, Hawaii Revised Statutes, which provides, in pertinent part:

§92F-2 Purposes; rules of construction.

In a democracy, the people are vested with the ultimate decision making power. Government agencies exist to aid the people in the formulation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formulation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible

In keeping with this policy, the UIPA provides 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. 1992). 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. 1992).

In determining whether government records must be made available for public inspection and copying under the UIPA, we observe at the outset that like the FOIA, and the open records laws of other states, the UIPA's disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure.³ It is the agency's

³See, e.g., John Doe Corp. v. John Doe Agency, 493 U.S. 146 (1986); Department of the Air Force v. Rose, 425 U.S. 352, 361-63 (1976); Seminole County v. Wood, 512 So.2d 1000 (Fla. Dist. Ct. App. 1987); City of Monmouth v. Galesburg Printing and Pub. Co., 494 N.E.2d 896 (Ill. App. 3 Dist. 1986); Title Research Corp. v. Rausch, 450 So.2d 933 (La. 1984); Hechler v. Casey, 333 S.E.2d 799 (W.Va. 1985); Laborers Intern. Union of North America Local 374 v. City of Aberdeen, 642 P.2d 418 (Wash. 1982); Bowie v. Evanston Comm. Consul. School Dist., 538 N.E.2d 557 (Ill. 1989); Lucas v. Pastor, 498 N.Y.S.2d 461 (N.Y. A.D. 2 Dept. 1986); OIP Op. Ltr. No. 92-27 (Dec. 30, 1992). See also, OIP Op. Ltr. No. 93-5 (June

burden to establish that government records, or portions thereof, being sought by a requester are protected from disclosure under section 92F-13, Hawaii Revised Statutes. Haw. Rev. Stat. §§ 92F-11(b), 92F-15(c) (Supp. 1992) ("[t]he agency has the burden of proof to establish justification for nondisclosure").

B. Convention Center Authority is an Agency Under the UIPA

Under section 206X-3, Hawaii Revised Statutes, the CCA is established as a "body corporate and a public instrumentality of the State," and is placed within the Department of Business, Economic Development, and Tourism for administrative purposes. Accordingly, the CCA is an "agency" for purposes of the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1992) ("agency" includes any unit of government in this State . . . governing authority . . . or any instrumentality of state or county government").

C. Point Tabulation Sheets are Government Records

The Point Tabulation Sheets relating to the scoring of design/build proposals which are maintained by the CCA constitute information maintained by an "agency" in written or other physical form. Accordingly, the Point Tabulation Sheets are "government records" for purposes of the UIPA. See Haw. Rev. Stat. § 92F-2 (Supp. 1992).

II. PUBLIC AVAILABILITY OF "GOVERNMENT PURCHASING INFORMATION, INCLUDING ALL BID RESULTS"

A. Section 92F-12(a)(3), Hawaii Revised Statutes

In addition to the general rule that all government records are open to public inspection unless access is closed or restricted by law, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information set forth therein, that must be made available for public inspection and copying "any provisions to the contrary notwithstanding." With respect to the list of records set forth in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history provides:

7, 1993); OIP Op. Ltr. No. 93-10 (Sept. 2, 1993); OIP Op. Ltr. No. 94-3 (Mar. 23, 1994).

Mr. Alan S. Hayashi
September 20, 1994
Page 12

In addition, however, the bill will provide, in Section -12, a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed . . . This list merely addresses some particular cases by unambiguously requiring disclosure.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphases added).

Of relevance to the issue presented, section 92F-12(a)(3), Hawaii Revised Statutes, provides that any provision to the contrary notwithstanding, each agency shall make available for public inspection and copying "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1992).

We have previously noted that section 92F-12(a)(3), Hawaii Revised Statutes, was included in the UIPA largely as a result of the recommendations set forth in Vol. I of the Report of the Governor's Committee on Public Records and Privacy (1987).⁴ With respect to government purchasing information, this report states:

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

⁴The UIPA's legislative history recognizes the important role played by the Governor's Committee on Public Records and Privacy. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093 (1988).

Mr. Alan S. Hayashi
September 20, 1994
Page 13

monitor abuse. To some degree, this is covered by issues discussed above under government employees, public works, and bid results. There is also, however, a desire to ensure that all State and county purchasing information is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that this 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 at 114 (1987) (emphases in original).

In our opinion, the Point Tabulation Sheets prepared by the two CCA evaluation boards for the proposals for the construction of a State convention center constitute "government purchasing information," since they were compiled by the CCA in response to a Request for Proposals for the design and construction of a State convention center. There is clearly a nexus between these evaluation scores and the CCA's eventual execution of a contract and the expenditure of public monies for the construction of a State convention center.

However, section 92F-12(a)(3), Hawaii Revised Statutes, contains an exception that is not present in any of the other paragraphs of this subsection. Specifically, it states that government purchasing information shall be made available "except to the extent prohibited by section 92F-13." In previous OIP opinion letters⁵, we concluded that this phrase was intended by the Legislature to permit an agency to withhold government purchasing information, the disclosure of which would result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

B. Records That Must Be Confidential To Avoid the

⁵See OIP Op. Ltr. No. 90-15 (Apr. 9, 1990); OIP Op. Ltr. No. 91-14 (Aug. 28, 1991); OIP Op. Ltr. No. 94-17 (Sept. 12, 1994).

Frustration of a Legitimate Government Function

The legislative history of the UIPA provides examples of records that may be withheld by an agency if their disclosure would result in the frustration of a legitimate government function, including:

- (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, including information pertaining to collective bargaining;
- (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
-
- (6) Propriety information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
- (7) Trade secrets or confidential commercial and financial information;

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

Only example number three would arguably apply to the present facts. The examples set forth in Senate Standing Committee Report No. 2580 quoted above were taken verbatim from exemptions contained in section 2-103 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled by the Legislature. Section 2-103(a)(5) of the Model Code permits an agency to withhold "information which, if

Mr. Alan S. Hayashi
September 20, 1994
Page 15

disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency." The commentary⁶ to this exception explains:

Subsection (a)(5) protects the integrity of the procurement and competitive bidding process. A few states include this type of provision in their freedom of information statutes. Mich Comp. Laws Ann. §15.243(1)(j); N.Y. Pub. Off. Law §87(2)(c); Vt. Stat. Ann. tit. 1, § 317(b)(13). Most states, however, have legislation specifically regulating the procurement practices of state or local government, e.g., Ga. Code Ann. §§23-1702, -1711; 40-1909-1913; 95A-1205. In that case, subsection (a)(5) does not restrict access to any information expressly made available to the public by that legislation. Otherwise, an agency in its discretion could use this exemption to withhold information unless, under the circumstances, state law prohibits disclosure of procurement and bidding information altogether. See Section 2-103(a)(11). Once a contract is let or a purchase is made, the exemption generally will no longer apply.

Model Code § 2-103 commentary at 17 (1980) (italics in original, emphases added).

The UIPA's pre-enactment history and section 92F-12(a)(3), Hawaii Revised Statutes, make clear that the disclosure policies underlying the UIPA are at their apex when the disclosure of government purchasing information, or information about the expenditure of public monies is involved.⁷

⁶The UIPA's legislative history provides that the commentary to the Model Code should guide the interpretation of similar provisions found in the UIPA where appropriate. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

⁷In this regard, see also Haw. Rev. Stat. § 92F-12(a)(8), (9), (10), (14) (Supp. 1992)

In contrast, the pre-enactment history of the UIPA⁸, and the UIPA's legislative history reflect that the frustration of legitimate government function exception permits an agency to withhold, at least on a temporal basis, information that would raise the cost of government procurements, or give a manifestly unfair advantage to any person proposing to enter into a contract with the agency.⁹ This exception exists, in our opinion, to permit the agency to obtain the most for the taxpayers' dollar, whereas the disclosure provisions of the UIPA exist to promote accountability in the expenditure of public funds, and to shed light upon the decisions and actions of government agencies and their officials.

C. UIPA Precedents

In the only appellate decision under the UIPA to date, Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365 (1993), the Hawaii Supreme Court held that under the UIPA's frustration of government function exception, the Aloha Tower Development Corporation ("ATDC") could withhold access to development proposals submitted by four developers proposing to enter into a long term development lease with the ATDC until the ATDC completed its selection procedure and made a final choice of the complex's

⁸Vol. I of the Report of the Governor's Committee on Public Records and Privacy 114 (1987) states in part:

The next issue raised was the availability of **bid documents and results**. There was, however, very little dispute over this issue. It was agreed that documents and results are available though not until the time of the award since the premature release of information might undermine the public purpose of the bid process. [Bold face in original, emphasis added).

⁹Similarly, Section 103D-303(d), Hawaii Revised Statutes, while inapplicable to the facts before us, requires the withholding of competitive sealed proposals "during the process of negotiation." This further evidences a legislative recognition that before an agency enters into a negotiated contract, the disclosure of certain information to competing bidders can result in the frustration of the procurement process.

developer.

Unlike the case before us, in which the various design proposals for a State convention center were made available for public review, based upon OIP Opinion Letter No. 89-15 (Dec. 20, 1989), the ATDC withheld the four development proposals that had been submitted from public inspection and copying. In that opinion, the OIP found that in light of the ATDC's long, multi-step selection process, the final decision is not made until negotiations are concluded and the lease and development agreement executed. We also found that disclosure of the proposals before the ATDC had completed negotiations with one of the developers could seriously frustrate the ATDC's selection process because if negotiations with the chosen developer broke down, the second developer would have a manifestly unfair advantage over the first if it had knowledge of the first (and unsuccessful) developer's proposal and the State's "bottom line." OIP Op. Ltr. No. 89-15 at 5.

Quoting Senate Standing Committee Report No. 2580, the Court found that the ATDC could withhold access to the four development proposals until the completion of its selection process, reasoning:

The submissions required of a proposed developer by an RFP, pursuant to ATDC Rule 15-26-44(5), clearly fall within one or more of the classes of information described in the legislative history set forth above. Public disclosure of development proposals--involving proprietary and other confidential information, such as trade secrets and confidential commercial and financial data--prior to final negotiation of a long-term lease could foreseeably give an unfair competitive advantage to other developers in the event that negotiations were to break down. Concern over this risk could cause developers to offer up deliberately vague plans or decline to submit development proposals altogether. The likely result would be fewer submissions and an increase in the cost of government procurements.

Kaapu, 74 Haw. at 389 (emphases added).

Mr. Alan S. Hayashi
September 20, 1994
Page 18

In the facts presented, we are not confronted with the disclosure of design or development proposals for the State convention center but rather, the Point Tabulation Sheets, or evaluation scores, awarded to the four design/build proposals by the CCA's Technical Review Board and Design Evaluation Board. Basic information concerning the four design proposals were made available by the CCA for public review and comments at a series of public meetings and presentations. Our review of the CCA's Point Tabulation Sheets reveals that they do not contain proprietary information, trade secrets, or confidential commercial and financial information.

In OIP Opinion Letter No. 91-14 (Aug. 28, 1991), we opined that rating sheets used to score proposals submitted in response to a Request for Proposals for Purchase of Service Contracts under chapter 42D, Hawaii Revised Statutes, must be made available for public inspection and copying under the UIPA. The rating sheets used to evaluate the proposals determined which proposals the agency would recommend that the Legislature fund as part of the agency's budget. We opined that the rating sheets were not protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, as intra-agency memoranda subject to the common law deliberative process privilege.¹⁰ We also opined that it would be unusual for the rating sheets to contain trade secrets, confidential commercial and financial information, proprietary information, or information which, if disclosed, would raise the cost of government procurements.

However, unlike the facts before us, the facts presented in OIP Opinion Letter No. 91-14 did not involve post-evaluation negotiations between an agency and the organization submitting a

¹⁰In previous opinion letters, for compelling public policy reasons, we have opined that under section 92F-13(3), Hawaii Revised Statutes, an agency may withhold access to certain intra-agency and inter-agency memoranda protected by the common law "deliberative process privilege." To be protected by this privilege a memoranda must be predecisional and deliberative. In Professional Standards Review Council of America, Inc. v. New York State Department of Health, 597 N.Y.S.2d 829 (N.Y.A.D. 1993), the New York Supreme Court, Appellate Division also found that rating sheets relating to an agency decision to award a contract to the successful bidder were not intra-agency memoranda protected by the common law deliberative process privilege.

purchase of service proposal. Based on the results of the evaluations of the proposals, the agency simply sought funding from the Legislature to fund purchase of service agreements under chapter 42D, Hawaii Revised Statutes, and did not enter into negotiations with the proposal submitter.

D. OIP's Analysis

Turning to the Point Tabulation Sheets containing the scores awarded by the two CCA evaluation boards to the four design proposals for the construction of a State convention center, the CCA asserts that disclosure of the scores before a contract has been executed could conceivably raise the cost of government procurements, or give an manifestly unfair advantage to Nordic/PCL with whom the CCA is currently negotiating changes in its design proposal, because the CCA's bargaining leverage would be impaired.

The CCA argues that, hypothetically speaking, if there is a wide disparity in the scores awarded to the four design proposals, and assuming that Nordic/PCL is armed with this information, it would be less likely to make the numerous requested design changes at no additional cost to the State, because Nordic/PCL would know that its proposal scored significantly higher than the other design proposals, and could conclude that the State is extremely motivated to contract with Nordic/PCL.

Additionally, in its letter to the OIP dated September 6, 1994, the CCA asserts that in the event that negotiations with Nordic/PCL break down, disclosure of the quality points awarded by the evaluation boards would compromise the negotiating position of the CCA with the design/build team awarded the second highest quality points, since the second design/build team would know its rank among the four design/build teams.

In this regard, the CCA's arguments are analogous to a situation involving a poker game in which an opposing player knows what cards the other player is holding and, therefore, it is armed with information making it easy to call the other player's "bluff."

In contrast, the fact that the CCA has not disclosed the scores awarded to the various design proposals might lead one to infer that there is a wide disparity in the evaluation scores, since if the scores were very competitive there would be

Mr. Alan S. Hayashi
September 20, 1994
Page 20

incentive for Nordic/PCL to make the design changes requested by the CCA to retain the benefits of a 200 million dollar State contract, and little frustration would result from the disclosure of the scores. Nevertheless, unless the CCA discloses the scores, Nordic/PCL is unable to actually confirm whether the scoring was widely disparate or competitive, or confirm the cards held in the hand of the CCA.

We believe that the issue presented is reasonably debatable. Admittedly, under the UIPA there is a compelling public interest in the availability of government purchasing information. However, we cannot ignore the UIPA's legislative history and the policies that underlie the "frustration of legitimate government function" exception, including an explicit recognition that in some circumstances, the disclosure of information before a contract is let could raise the cost of government procurements or give a person a manifestly unfair advantage in entering into a contract with an agency.

The CCA's procurement process does not immediately come to a conclusion with its selection of a design/build team. Chapter 206X, Hawaii Revised Statutes, clearly authorizes the CCA to negotiate with a selected developer, or to "modify" its proposal, any provision of law to the contrary notwithstanding. Haw. Rev. Stat. § 206X-4(b)(21) (Comp. 1993). Similarly, administrative rules adopted by the CCA clearly permit the CCA to enter into negotiations with the design/build team after publicly announcing the selection of a developer. HAR § 15-107-11(j). The fact that Nordic/PCL has submitted a performance bond does not give the State any leverage in negotiating design changes with Nordic/PCL. The performance bond only guarantees Nordic/PCL's performance of the design/build proposal it actually submitted.

Despite the existence of sound arguments for and against disclosure, we are constrained to conclude that the CCA has sustained its burden of demonstrating that the disclosure of the quality point scores awarded by the CCA's Technical and Design Evaluation Boards could conceivably raise the cost of government procurements or give Nordic/PCL a manifestly unfair advantage during the negotiation of a final convention center development contract. While it is true that Nordic/PCL may assume that a wide disparity in the quality point scores exists, it will remain in a state of uncertainty unless the CCA actually confirms the evaluation results. The elimination of this uncertainty could significantly induce Nordic/PCL not to make the design changes requested in negotiations with the CCA without increasing its

Mr. Alan S. Hayashi
September 20, 1994
Page 21

\$200 million price proposal.

It is the presence of the CCA's authorized contract negotiations which is a decisive factor in leading us to conclude that until the final execution of a development agreement, the CCA may, but is not required to, withhold access to the completed Point Tabulation Sheets of the Technical and Design Boards in order to avoid the frustration of a legitimate government function.

As the commentary to section 2-103(a)(5) of the Model Code indicates, the protection afforded by this exception is generally temporal in nature. Once a contract has been executed with one of the design/build teams, any frustration of government function will have dissipated. Therefore, upon the execution of a development contract, the completed Compiled and Individual Point Tabulation Sheets attached to this opinion as Exhibits C through F must be made available for public inspection and copying. Under these circumstances, the disclosure of the Point Tabulation Sheets would not raise the cost of government procurements, or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with the CCA.

CONCLUSION

For the reasons set forth above, it is our opinion that until the final execution of a convention center development contract, the CCA may withhold from public inspection and copying the Point Tabulation Sheets containing the quality points, or evaluation scores, awarded to the four design/build proposals. At such time as a final development contract has been executed, it is our opinion that the completed Compiled and Individual Point Tabulation Sheets attached as Exhibits C-F must be made available for public inspection and copying under the UIPA.

Please contact me at 586-1404 if you should have any questions regarding this opinion letter.

Very truly yours,

Hugh R. Jones
Staff Attorney

OIP Op. Ltr. No. 94-18

Mr. Alan S. Hayashi
September 20, 1994
Page 22

HRJ:si
Attachments: Exhibits A through F

APPROVED:

Kathleen A. Callaghan
Director

c: Honorable Robert A. Marks (w/enclosures)
Desmond Byrne (w/enclosures)
Mervyn M. Kotake, Esq. (w/enclosures)
Jeffrey S. Portnoy, Esq. (w/enclosures)