

May 4, 1995

Honorable Margery S. Bronster
Attorney General
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Attention: Michael Q.Y. Lau
Deputy Attorney General

Dear Ms. Bronster:

Re: UIPA Request of Gusalino Brothers Construction, Inc.

This is in reply to a letter dated January 30, 1995 from Deputy Attorney General Michael Q.Y. Lau requesting an opinion regarding the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the State Department of Transportation ("DOT") must, upon request, disclose records in the physical possession of two of its contractors pertaining to work performed in connection with the Electrical Distribution Modernization, Phase II, Project No. 101098-14 at the Honolulu International Airport.

BRIEF ANSWER

Yes, to the extent that such records are not protected by any of the exceptions in section 92F-13, Hawaii Revised Statutes. The UIPA requires an agency to disclose, upon request, "government records," which term is defined to mean "information maintained by an agency in written, auditory, visual, electronic or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). In previous OIP opinion letters we applied the definition of the term "maintain" set forth in the uniform law upon which the UIPA was modeled, and opined that an agency that lacks physical custody of a record may nevertheless "maintain" the record if it retains administrative control over the record.

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Based on a legal opinion from the Department of the Attorney General dated March 28, 1995 addressed to the Director of the OIP interpreting the provisions of the State contracts with the two contractors involved, we believe that the State does "administratively control" the contractors' records relating to the project. Specifically, according to the Department of the Attorney General, during the contractors' performance of the work under the two contracts, the State retains the right to inspect and to copy the contractors' records before final payment and for a period of three years thereafter.

Because the DOT retains the enforceable right to obtain copies of the contractors' records pertaining to the project, it is our opinion that the DOT retains administrative control of the records and, therefore, maintains the records involved. Accordingly, these records are "government records" for purposes of the UIPA.

FACTS

The State of Hawaii, through the DOT, initiated improvements at the Honolulu International Airport, which included the Electrical Distribution System Modernization, Phase II, Project No. A01098-14 ("Project"). The State retained M&E Pacific, Inc. ("M&E") as the Project Manager for the Project under Contract Number 12106 and amendments thereto ("M&E Contract"). The State also retained GMP Associates, Inc. ("GMP") as the construction manager consultant for the Project under Contract Number 22911 and amendments thereto ("GMP Contract").

According to Deputy Attorney General Lau, the State: (1) has not finally accepted the work performed by M&E and GMP, (2) has not made final payments, and (3) has not yet terminated these contracts.

Gusalino Brothers Construction, Inc. ("GBC"), a company contracting with GMP to provide labor and materials on the Project, requested, under the UIPA, to inspect and copy records in the possession of GMP and M&E. GBC has filed suit against the State alleging that it was not adequately compensated for work

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performed on the Project, interest owed, and delay and impact costs.

By letter dated January 30, 1995, Deputy Attorney General Lau requested the OIP to provide him with an advisory opinion concerning whether records in the physical possession of the DOT's contractors on the Project must be made available for public inspection and copying in light of provisions in the M&E and GMP Contracts pertaining to the ownership of the contractors' records.

DISCUSSION

I. INTRODUCTION

Under the UIPA, except as provided in section 92F-13, Hawaii Revised Statutes, "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, visual, auditory, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added); see also Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n. 10 (1993). If the records requested by GBC are "maintained" by the DOT, they must be made available for inspection and copying, except as provided in section 92F-13, Hawaii Revised Statutes.

While the Legislature did not define the meaning of the term "maintain" when it adopted the UIPA, in OIP Opinion Letter No. 91-5 (April 15, 1991), the OIP concluded that the definition of this term set forth in the uniform law upon which the UIPA was modeled provides useful guidance in construing the meaning of this term.

The Legislature modeled the UIPA upon the Uniform Information Practices Act ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws in 1980. The term "maintain" is defined in section 1-105(6) of the Model Code to mean "hold, possess, preserve, retain, store, or

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administratively control." The commentary¹ to this Model Code provision reflects that: (1) the term "maintain" was defined broadly, and (2) an agency that lacks physical custody of a record may nevertheless "maintain" that record:

Maintain is defined in section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of this definition is especially important since it prevents an agency that does not have physical custody of government records from evading its obligations under this Code.

Model Code § 1-105 commentary at 9 (1980) (emphasis added).

In OIP Opinion Letter No. 92-25 (Dec. 22, 1992), we noted that the term "control" has different meanings depending on the context in which it is used, and that for the most part:

[I]t refers to the "power or authority to manage, direct, or oversee," or "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." See OIP Op. Ltr. No. 91-5 at 7, and cases cited therein; see also, Biben v. Card, 119 F.R.D. 421, 425 (W.D.Mo. 1992); M.L.C v. North American Philips Corp., 109 F.R.D. 124, 136 (S.D. N.Y. 1992) ("control" includes legal right of producing party to obtain documents from other sources upon demand").

OIP Op. Ltr. No. 92-25 at 4 (Dec. 22, 1992).

As a result, in OIP Opinion Letter No. 92-25 we opined that the Legislative Auditor "maintained" records in the physical possession of a certified public accountant ("CPA") retained by contract because the Legislative Auditor's contract with the CPA provided that "[a]t any time during and subsequent to the

¹The UIPA's legislative history suggests that the Model Code commentary be consulted for guidance in interpreting similar provisions in the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

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completion of the audit, the Contract Auditor shall make available to the State Auditor the working papers developed during the audit." OIP Op. Ltr. No. 92-25 at 5 (emphasis added).

Accordingly, to determine whether the State retains administrative control over records that are in the physical possession of M&E and GMP, it is necessary to evaluate the provisions of the State's contracts with these contractors.

II. THE CONTRACTUAL PROVISIONS

Section 3.12 of the GMP contract provides:

3.12 Inspection. The Consultant and his subcontractors shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and to [sic] make such materials available at their respective offices at all reasonable times during the contract period and for three (3) years from the date of final payment under the contract, for inspection by the State and, in the case of federal-aid projects, by authorized representatives of the Federal Government and shall furnish, if requested, a maximum of eight (8) copies thereof.

Section 5.3j(5) of the GMP Contract provides:

5.13 Work by Consultant.

j. Records

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(5) All construction records shall become the property of the State upon termination of this Contract.

Section 3.12 of the M&E Contract provides:

3.12 Inspection. The State, the FAA Administrator, the Comptroller General of the United States, and other authorized representatives of the Federal Government may inspect the Work of the Consultant and his subcontractors, if any, at any time. The

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State and authorized representatives of the Federal Government may also inspect the Consultant's and subcontractor's books, documents, papers, records, and accounts pertaining to the Work and to [sic] require the Consultant and subcontractor to furnish copies thereof for a period of three (3) years after termination of the Contract or final acceptance. [Emphasis added.]

Section 3.13 of the M&E Contract provides:

3.13 Ownership of Designs, Plans, Reports and Documents. Upon termination of the Contract or final acceptance of the Work by the State, all Designs, Plans, Reports and Documents of the Consultant's work product shall become the sole property of the State.
The Consultant shall compile and submit in an orderly manner to the State all Designs, Plans, Reports and Documents prepared by the Consultant in the course of the execution of the Work under the Contract. [Emphasis added.]

We believe that section 3.12 of the M&E Contract is ambiguous, in that there is some doubt concerning whether: (1) the State may inspect and copy M&E's records both during the execution of the work, and for a period of three years after termination of the contract, or (2) may inspect M&E's records during the execution of the work, and may copy the records for a period of three years after termination of the contract.

As a result of this ambiguity, the OIP requested the Attorney General to provide an interpretation of the contractual provisions quoted above. In an opinion dated March 28, 1995, a copy of which is attached as Exhibit "A," the Attorney General also observed that the contractual provisions could be interpreted in one of two possible ways:

One interpretation is that the State may inspect the records at all reasonable times, prior to final payment and for three (3) years thereafter, but only the Federal Government is entitled to eight (8) copies of the records where federal-aid projects are involved. The second interpretation is that, prior to final payment and for three (3)

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years thereafter, the consultant must furnish upon request, up to eight (8) copies to both the State and the Federal Government [sic].

In construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested in the contract in its entirety; if there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen. University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii, 66 Haw. 214, 659 P.2d 720 (1983). Based upon this principle, we believe that the second interpretation is more reasonable. GMP was retained as the Construction Manager for the State and the State requires the ability to inspect the consultant's records and to maintain its own records while the project is ongoing (as noted in your memo, by the terms of the contract the consultant's records do not become the State's property until termination of the contract or final acceptance of the consultant's work). To limit the State to inspection of the records "at all reasonable times" and not to allow it to have copies would be unduly burdensome on the State's efforts to keep informed and maintain its own documentation for the project.

Letter from Michael Q.Y. Lau to OIP Director Kathleen A. Callaghan dated March 28, 1995 at 2.

Deputy Attorney General Lau also concluded that under the M&E Contract, the State retains the right to obtain copies of the contractor's records when the work is in progress.

Based upon the Attorney General's opinion dated March 28, 1995, it is the opinion of the OIP that the DOT retains administrative control of the contractors' records and, therefore, maintains the records, since during the performance of the contractors' work the State retains the enforceable right to obtain copies of the records, and not merely the right to inspect the records. Because we have concluded that the DOT maintains records in the physical possession of GMP and M&E relating to the project, we therefore conclude that these are "government records" for purposes of the UIPA. Accordingly, under the UIPA,

OIP Op. Ltr. No. 95-8

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the DOT must disclose records in the physical possession of M&E and GMP, except as provided in section 92F-13, Hawaii Revised Statutes.

CONCLUSION

We conclude that records in the physical possession of GMP and M&E relating to the project are "government records" for purposes of the UIPA. Under the DOT's contracts with GMP and M&E, it retains the enforceable right to obtain copies of the contractor's records during the performance of the work and, therefore, the DOT administratively controls the records in question. As such, the records in question constitute "information maintained by an agency in written . . . or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (definition of government record).

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

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment
c: Warren Goolsby