

December 17, 1997

Mr. Jack Willey  
President  
Interisland Systems Development & Integration  
1600 Kapiolani Boulevard, Suite 1100  
Honolulu, Hawaii 96814

Dear Mr. Willey:

Re: Access to Information Contained in State Geographic Information  
System Database

This is in reply to your June 5, 1991 letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning your right to inspect and copy geographic information system ("GIS") data developed by the Office of Planning in cooperation with other State and county government agencies. In responding to your letter, the OIP also will address the concerns raised by two other parties who have requested guidance on the release of data contained in the State GIS.

After you wrote to us, in a separate memorandum, then Director of the Office of Planning<sup>1</sup>, Harold S. Masumoto, also requested an advisory opinion regarding the disclosure of information contained in the GIS. In his July 30, 1991 letter, Mr. Masumoto requested the OIP's assistance with several questions. However, subsequently, through conversations in July and September, 1997, with Mr. Craig Tasaka, GIS Planning Program Manager of the Office of Planning, the OIP has learned that, having already resolved the other inquiries, the Office of Planning now only requires assistance with the following:

Does the presence of any database on the State's system make it automatically subject to public access policies? For example, the State has a portion of The Nature Conservancy's ("TNC") database on the system. TNC claims their database is proprietary and that all inquiries by

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<sup>1</sup>While the request came from the Office of State Planning, the agency has since been placed under the Department of Business, Economic Development and Tourism and renamed the Office of Planning.

non-State agencies for their data should be directed to them.

On December 9, 1992, Suzanne D. Case, Esq., Pacific Regional Counsel for TNC, requested an opinion on the applicability of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, ("UIPA") to the Hawaii Natural Heritage Program ("HINHP")<sup>2</sup> data to be contained in a GIS that would be developed and shared with the State of Hawaii under a Cooperative Agreement. Along with the request for opinion, Ms. Case submitted a position paper which set forth TNC's position with regard to disclosure of the HINHP material. While Ms. Case's December 9, 1992, letter did not address the HINHP material already incorporated into the State GIS pursuant to Contract No. 28848 and supplemental agreements between TNC and the Office of Planning, Ms. Case and Mr. Sam Gon of TNC indicated in telephone conversations with the OIP that TNC also is interested in protecting that material from disclosure. Therefore, this opinion will address the material already incorporated into the State GIS, as well as the updated material that TNC hopes to share with the State.

### **ISSUE PRESENTED**

Whether, under the UIPA, the HINHP GIS database provided to the State by TNC and incorporated into the State GIS must be made available for public inspection and copying upon request.

### **BRIEF ANSWER**

No. Under section 92F-13(3), Hawaii Revised Statutes, the HINHP data is exempt from disclosure as confidential commercial information which, if disclosed, would result in the frustration of a legitimate government function. Because of the likelihood that disclosure would result in both the impairment of the State's ability to obtain such information and in substantial competitive injury to TNC, the Office of Planning is not required to disclose the HINHP data under the exception to the UIPA based on the frustration of a legitimate government function.

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<sup>2</sup> The Hawaii Heritage Program has since been renamed the Hawaii Natural Heritage Program.

TNC is the only source of a comprehensive compilation of data on the geographic location and status of rare species and ecosystems in the State of Hawaii, which is contained in its HINHP data bank. While TNC has provided HINHP data for the State GIS pursuant to contract, consistent with the terms of its position paper and proposed Cooperative Agreement, TNC maintains that it will only provide further information if confidentiality can be assured. Significantly, TNC has declined to update its GIS information with the Office of Planning in the five years since the issue of disclosure has arisen. Therefore, the OIP concludes that public disclosure of this data likely will impair the State's ability to obtain information on rare species and ecosystems.

In addition, TNC regularly sells the HINHP data to private parties, as well as governmental agencies. Should the HINHP data be disclosed by the State, persons seeking HINHP data no longer would need to purchase the data from TNC. Therefore, TNC would be deprived of its position as the sole purveyor of the HINHP data and likely would suffer substantial competitive injury. In turn, TNC would be unwilling to provide further HINHP data to the State and the State's ability to obtain updated information for the HINHP GIS database would be impaired, frustrating its ability to effectively carry out its planning and environmental protection functions.

### **FACTS**

The Office of Planning, Department of Business, Economic Development & Tourism (previously the Office of State Planning under the Governor's Office), has developed a State GIS. The Information and Communication Services Division, formerly under the Department of Budget and Finance and now under the Department of Accounting and General Services, is the official system operator and repository for the data contained in the GIS.

A GIS is an electronic mapping system in which information from a wide variety of sources may be merged into a map to provide an analytical tool for planning and other spatial data applications. The GIS is designed to gather, organize, process, and display together a wide variety of information or data at a common scale, allowing geographically specific information to be overlaid and analyzed together. Nationwide, GIS technology is being used to combine state and municipal maps with data from other sources, and to provide users with information on various characteristics of a geographic location, including for example, the census or population, water and mineral resources, land use classifications, environmental hazards, school attendance areas, endangered

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species, and lava zones. The resulting product is used for purposes such as planning and analysis of natural resources and environmental programs, determining priority lands for public purchase, land use classification, and determining the best sites for waste disposal . See generally, "GIS Benefits All Levels of Government: State Leadership Trends," Government Technology, Aug. 1991, at 26; "A Sense of Where You Are: Powerful Computerized Maps are Helping Make Order Out of an Increasingly Complicated World," U.S. News & World Report, Apr. 15, 1991, at 58.

The State GIS pulls together data from numerous sources, including the State's Department of Agriculture, the Land Use Commission, and the Department of Land and Natural Resources, as well as TNC. The GIS is compiled and continually updated for uses as diverse as planning for the building of additional schools, the protection of environmental resources, the development of appropriate land use policies, and the preparation of evacuation routes.

As stated in its December 9, 1992 letter and confirmed with Suzanne Case, Esq. and Mr. Dan Orodener of TNC, TNC, a non-profit corporation, is an international membership organization committed to the preservation of natural diversity. TNC's Hawaii field office, TNC of Hawaii, is wholly operated and funded by TNC. In 1983, TNC developed the Hawaii Natural Heritage Program to produce a comprehensive, permanent, and dynamic atlas and data bank on the existence, identity, characteristics, numbers, condition, and status of the rarest elements of natural biological and ecological diversity throughout the State. While portions of the information contained in the HINHP database were gathered through field research performed by TNC of Hawaii while under contract with State agencies,<sup>3</sup> the HINHP database is a composite of information from many sources, including TNC research conducted for federal agencies and private entities.

Ten of the fifty TNC of Hawaii employees work for and administer the HINHP. This staff is housed in a separate area of TNC of Hawaii field office, and is budgeted separately from other TNC programs. The HINHP is self-funded through contracts, cooperative agreements, and fees-for-services to provide biological information to private parties (generally landowners) and

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<sup>3</sup>In at least one instance, field data compiled by a State agency has been examined by HINHP, and pertinent data on rare species and ecosystems were extracted and compiled into the HINHP database.

government agencies. The HINHP does not receive grants of operating funds from governmental agencies.

On May 7, 1990, the Office of Planning and TNC entered into Contract No. 28848 under which TNC was hired as a consultant to assist the Office of Planning in planning and conducting workshops on native ecosystems and rare species. The purpose of the workshops was to identify areas that should be included in the State Conservation District and areas with important biological resources within the State Conservation District. The contract also required TNC to assist in producing reports and maps based upon the workshop participants' input. Contract No. 28848 did not require that the Office of Planning keep confidential the reports or material produced by TNC under the contract, and it specifically provided that any documents produced under the contract would not be the subject of a copyright by TNC without the Office of Planning's prior written consent.<sup>4</sup>

Contract No. 28848 subsequently was amended on June 17, 1991, by Supplemental Agreement No. 1 to Modify Contract No. 28848 ("Supplemental Agreement No. 1"), and on August 10, 1992, by Supplemental Agreement No. 2 To Modify Contract No. 28848 ("Supplemental Agreement No. 2"). Among other things, Supplemental Agreement No. 1 expanded the scope of services of the original contract to include reviewing and correcting data from the Hawaii Natural Heritage Program that previously was entered into the State GIS. It also required TNC to update Hawaii Natural Heritage Program information not

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<sup>4</sup> Contract No. 28848 provided as follows:

9. Confidentiality of Material. Any reports and maps prepared or assembled by CONSULTANT under this Agreement shall not be made available to an individual or organization by CONSULTANT without prior written permission of OSP, with the exception of biological data which come out of the workshops and can be incorporated into the Hawaii Heritage database and used for all purposes of that program.
10. Copyright. Any summary, report, map, chart, graph, table, publication, or other document produced in whole or in part under this Agreement shall not be the subject of a copyright by or on behalf of CONSULTANT without the prior written consent of OSP.

previously incorporated into the State GIS, by digitizing and attaching the data base. In addition, Supplemental Agreement No. 1 included a paragraph that affirmed the continuing effect of the provisions found in Contract No. 28848, as follows:

It is further understood and agreed that all provisions of the Primary Agreement, unless specifically modified, altered, and changed herein, shall remain in full force and effect.

Supplemental Agreement No. 2 extended the date of termination of the contract.

Pursuant to Contract No. 28848 and Supplemental Agreements No. 1 and 2, through use of the State equipment, TNC put into GIS form its HINHP data. The HINHP GIS database provides information on the status and locations of rare species and ecosystems, which is valuable to State departments as they address issues involving land use, development, and the environment. As confirmed by the OIP in conversations with Suzanne Case, Esq. and Mr. Sam Gon of TNC, TNC has not requested and did not receive consent from the Office of Planning to register the HINHP GIS database for copyright protection.

In a telephone conversation with the OIP, Suzanne Case, Esq. explained that at the time of the contracts, the HINHP material was provided to the Office of Planning with the expectation that it only would be used for non-commercial, public planning and information purposes, and there was no realization that the advances in technology would make the material available in the manner now requested by members of the public.

After the initial provision of information under Contract No. 28848 and Supplemental Agreements No. 1 & 2, in the past five (5) years, specifically because of its concerns with the possible disclosure of its HINHP material, TNC has not updated its GIS database with the Office of Planning. Furthermore, consistent with the terms of the proposed Cooperative Agreement submitted by TNC in December, 1992, in a telephone conversation on October 3, 1997, Mr. Dan Orodener of TNC indicated that while TNC would make information available to the State on a piecemeal basis by providing maps when information on specific locations is requested, without assurances of confidentiality, TNC will not provide the kind of comprehensive information that would be available through the downloading of electronic information and the GIS.

Finally, in a conversation with the OIP on October 31, 1997, Suzanne Case, Esq. and Mr. Sam Gon of TNC expressed concern that disclosure of the HINHP GIS database presently incorporated in the State GIS could be problematic. Their concern arises because the HINHP GIS database is now out-of-date and inaccurate. Furthermore, even at the time the HINHP GIS database was provided, because it was provided only for use in the Office of Planning's conservation area boundary review, the database does not provide the depth of information necessary for appropriate use in other applications.

## DISCUSSION

### I. INTRODUCTION

Except as provided in section 92F-13, Hawaii Revised Statutes, all government records must be made available for inspection and copying upon request by any person. Haw. Rev. Stat. § 92F-11(b) (1993). 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 (1993). As information maintained by an agency in electronic form, the State GIS is a government record subject to disclosure under the UIPA.<sup>5</sup> Haw. Rev. Stat. § 92F-3 (1993). See also OIP Op. No. 90-35 (Dec. 17, 1990) (The names and addresses of persons who filed a Declaration of Water Use maintained on computer database by the Commission on Water Resource Management constituted a government record under the UIPA).

### II. SECTION 92F-13(3), HAWAII REVISED STATUTES: CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION

In its December 9, 1992 position paper, TNC asserts that the HINHP GIS database constitutes confidential commercial information exempt from

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<sup>5</sup>While the proposed Cooperative Agreement provides that all HINHP data provided by TNC "shall not be deemed the property or records of any governmental entity," state law, not contractual language, governs whether a record is a government record subject to the UIPA. See, SHOPO v. Society of Professional Journalists, 83 Haw. 378, 413-414 (1996); OIP Op. Ltr. No. 90-39 (Dec. 31, 1990). Likewise, where it conflicts with State law, the provision in the proposed Cooperative Agreement that HINHP data may not be released pursuant to any State open records law also does not control public access to the record. SHOPO v. Society of Professional Journalists, 83 Haw. 378, 413-414 (1996).

disclosure under the UIPA. Section 92F-13(3), Hawaii Revised Statutes, provides that agencies are not required to disclose “government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” Haw. Rev. Stat. §92F-13(3)(1993). Trade secrets or confidential commercial and financial information are examples of records which may be exempt from disclosure under this exception. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). See also, Kaapu v. Aloha Tower Development Corporation, 74 Haw. 365, 389 (1993). In analyzing whether a government record constitutes confidential commercial and financial information, as suggested by legislative history, the OIP has referred to federal case law. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093-5 (1988); OIP Op. Ltr. No. 97-4 (April 22, 1997).

#### **A. Commercial or Financial Information**

To qualify as confidential commercial or financial information, a government record must be “commercial or financial, obtained from a person, and privileged or confidential.” Gulf & Western Indus. v. United States, 615 F. 2d 527, 529 (D.C. Cir. 1979). The HINHP GIS database meets these requirements.

As a non-profit corporation, TNC is a “person” under the terms of this exemption. See Nadler v. FDIC, 92 F. 3d 93, 95 (2d Cir. 1996); Comstock Int’l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 806 (D.D.C. 1979) (The term “person” referred to in FOIA exemption no. 4, 5 U.S.C. §552(b)(4), includes individuals, partnerships, corporations, associations, or public or private organizations other than an agency).

In addition, the HINHP GIS database is commercial information. Information is commercial so long as the party submitting the information has a commercial interest in it, or if the record pertains or relates to, or deals with commerce. Public Citizen Health Research Group v. FDA, 704 F. 2d 1280, 1290 (D.C. Cir. 1983); American Airlines, Inc. v. Nat. Mediation Bd., 588 F. 2d 863 (2d Cir. 1978). Where a document submitted to the government can be sold as a commodity, the document has intrinsic value and is commercial information within the meaning of the exemption from release for confidential commercial information. See FOIA Update, Vol. VI, No. 1 at 3-4 (Winter 1985). Furthermore, commercial information can include information submitted by a nonprofit entity, such as the TNC. See Critical Mass Energy Project v. NRC,

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975 F. 2d 871 (D.C. Cir. 1992)(en banc), cert. denied, 507 U.S. 984 (1993); Sharyland Water Supply Corp. v. Block, 755 F. 2d 397 (5<sup>th</sup> Cir.), cert. denied, 471 U.S. 1137 (1985); American Airlines, Inc. v. Nat. Mediation Bd., 588 F. 2d 863 (2d Cir. 1978).

Here, because TNC regularly sells the HINHP data contained in its HINHP GIS database, the HINHP GIS database is intrinsically valuable, and thus, is "commercial information." Therefore, the OIP believes that the HINHP GIS database is commercial information obtained from a person.

### **B. Confidential**

To determine whether a commercial or financial record is confidential under the exception to disclosure for the "frustration of a legitimate government function," the OIP has referred to the federal case of National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). See, e.g., OIP Op. Ltr. No. 97-4 at 5-6 (April 22, 1997). National Parks states:

[C]ommercial or financial matter is "confidential" for purposes of this 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 and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).<sup>6</sup> The HINHP GIS database meets both prongs of the test for confidentiality set forth in National Parks and Conservation Ass'n v. Morton, 498 F. 2d 765, 770 (D.C. Cir. 1974) previously applied by the OIP. See, e.g., OIP Op. Ltr. No. 97-4 at 5-6 (April 22, 1997).

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<sup>6</sup>Subsequently, in Critical Mass Energy Project v. NRC, 975 F. 2d 871 (D.C. Cir. 1992) (*en banc*), cert. denied, 507 U.S. 984 (1993), the D.C. Circuit court limited usage of the National Parks test to cases involving the mandatory disclosure of information, and held that for cases involving the voluntary disclosure of information, the record is exempt from disclosure where the submitter would not ordinarily disclose the information to the public. Because the present case meets the more stringent National Parks test, the OIP need not at this time determine whether the Critical Mass decision should be applied to determine whether commercial or financial information is exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes.

## 1. Impairment of the State's Ability to Obtain Information

If the HINHP GIS database is disclosed, it likely will impair the State's ability to acquire such information in the future. Here, TNC is not required by statute or rule to provide the data; the initial provision of the HINHP GIS database was made as a result of Contract No. 28848 and supplements, which was freely entered into by TNC with the Office of Planning. TNC has since indicated that it will not provide further such information without an assurance of confidentiality. In a telephone conversation with the OIP on October 3, 1997, Dan Orodener indicated that while TNC would provide HINHP data on a piecemeal basis in the form of maps when requests concerning specific locations arise, it would not provide the State with comprehensive updated HINHP GIS data in electronic form that allows a user the ability to view and manipulate the information in the way most valuable for planning. This statement is consistent with TNC's refusal to provide such information in the past five (5) years since the issue of disclosure has arisen, and with the terms of TNC's proposed Cooperative Agreement, which provide that any further provision of HINHP data to the State is conditioned upon assurances of confidentiality.<sup>7</sup> Therefore,

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<sup>7</sup>The proposed Cooperative Agreement provides:

3.C.(2)c. TNC Ownership of Heritage Data.  
Notwithstanding the provisions of section 3.C.(2)b. above, or any prior agreements...STATE and USFWS expressly agree that all Heritage data provided by TNC shall remain the exclusive property of TNC and shall not be deemed the property or records of any governmental entity. STATE and USFWS agree that release or use of Heritage data, other than as expressly permitted by this Agreement, would cause substantial, irreparable, and competitive harm to TNC, and would have a chilling effect on TNC's willingness to provide such data in this manner. STATE and USFWS further agree that TNC is relying on STATE's and USFWS's guarantee of confidentiality and nondisclosure of TNC's proprietary Heritage compilations of data as partial consideration for TNC's participation under this Agreement, and the further guarantee that STATE and USFWS will not disclose Heritage data to any requester under any state or federal freedom of information act, uniform information practices act, or any other laws.

the threat of disclosure already has impaired the State's receipt of updated HINHP data, and it appears likely that it will continue to impair the State's ability to receive the HINHP data from TNC in the future. As TNC is the only source of the comprehensive compilation of information on rare species and ecosystems, the State's ability to obtain such information at all will be impaired, frustrating the State's ability to effectively carry out its planning and environmental protection functions.

## **2. Substantial Harm to Competitive Position**

Disclosure of the HINHP GIS database likely will cause substantial harm to TNC's competitive position. To meet the requirements of the National Parks competitive harm prong, actual harm need not be established. See GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9<sup>th</sup> Cir. 1994); Gulf & Western Indus. v. United States, 615 F. 2d 527, 530 (D.C. Cir. 1979). It is enough if there is (1) actual competition; and (2) a likelihood of substantial competitive injury. See GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9<sup>th</sup> Cir. 1994); Gulf & Western Indus. v. United States, 615 F. 2d 527, 530 (D.C. Cir. 1979).

Here, TNC's Hawaii Natural Heritage Program regularly sells its HINHP data and funds its operations through that sale of the HINHP data. See December 9, 1992 letter from Suzanne Case, Esq. of TNC. While TNC is presently the only source for the comprehensive information provided in the HINHP GIS database, other competitors or "information providers" that make it their business to provide real estate information and government documents for a fee, do exist. Disclosure would provide those competitors with access to the HINHP database, thereby allowing them to compete with TNC in the sale of such information. Furthermore, disclosure also would allow persons who otherwise would have been TNC customers to obtain the information from the State, which itself would then represent competition for TNC. The disclosure of the HINHP GIS database, therefore, would deprive TNC of its present position as the sole purveyor of the HINHP data and likely would cause it substantial competitive injury. In turn, because of the harm that it is likely to suffer, TNC will not provide further HINHP data to the State if the information is disclosed. As stated above, this would impair the State's ability to obtain further such information, frustrating the State's ability to effectively address issues involving land use, development, and the protection of the environment.

In assessing whether information that has been provided to the government is confidential, courts also have held that information that is publicly available through other sources is not confidential in nature. See Anderson v. HHS, 907 F. 2d 936, 952 (10<sup>th</sup> Cir. 1990); Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996). Here, some of the HINHP data may be available in a piecemeal manner from public records maintained by the State. However, the proprietary value of the HINHP GIS database lies in the fact that the HINHP GIS database provides a comprehensive compilation of data from various public and other sources, resulting in one informational resource that is unavailable from any other source. Thus, because the HINHP GIS database is a compilation of information that in toto is not otherwise publicly available, the fact that some of the information of which it consists is publicly available elsewhere does not vitiate its confidential nature.

Therefore, as disclosure of the HINHP GIS database likely would impair the State's ability to obtain further such information and cause substantial competitive injury to TNC, the HINHP GIS database constitutes confidential commercial information obtained from a person that is exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes. Accordingly, pursuant to the UIPA exception to disclosure for the "frustration of a legitimate government function," the Office of Planning is not required to make the HINHP GIS database available for public inspection and copying.

### III. TNC'S OTHER OBJECTIONS

In its December 9, 1992, position paper, TNC also asserts that its HINHP GIS database is exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes, first, as a "trade secret," second, as "proprietary information manufactured or marketed by persons under exclusive legal right,"<sup>8</sup> and third,

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<sup>8</sup>In its position paper, TNC claims a proprietary interest based on copyright ownership of the HINHP material. However, with regard to material already incorporated into the State GIS, questions exist as to TNC's copyright ownership of the Heritage data in the GIS. The HINHP data was put into GIS format as part of TNC's work for the Office of Planning under the Contract No. 28848 and its supplements, which provide that TNC could not obtain a copyright of the material developed under the contract without the written consent of the Office of Planning, which TNC did not obtain. Furthermore, even with regard to material proposed for sharing under the Cooperative Agreement which are not subject to the concerns as to copyright ownership by TNC, questions remain as to the State's ability to completely preclude disclosure as proposed by TNC. See OIP Op. Ltr. No. 90-20 (June 12, 1990); 17 U.S.C. § 107 (1996)

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as information, which if disclosed, would give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency.<sup>9</sup> However, because the exemption under section 92F-13(3), Hawaii Revised Statutes, protecting confidential commercial information resolves the question of whether the HINHP GIS material must be disclosed, the OIP need not address TNC's further assertions at this time.

#### IV. SEGREGATION

The State has made GIS information available to the public under the UIPA. However, because the HINHP GIS database within the State GIS constitutes confidential commercial information exempt from disclosure, the Office of Planning may segregate the HINHP GIS database from the public information contained in the GIS before making the GIS available to the public. See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 90-8 (Feb. 12, 1990); 90-31 (Oct. 25, 1990); 91-1 (Feb. 15, 1991); 94-17 (Sept. 12, 1994); 95-13 (May 8, 1995).<sup>10</sup>

#### CONCLUSION

The State GIS is a "government record" subject to the UIPA. However, the OIP finds that the HINHP GIS database contained in the State GIS constitutes confidential commercial information, the disclosure of which would frustrate the State's legitimate government function. Therefore, the HINHP GIS database is exempt from disclosure under section 92F-13(3), Hawaii Revised

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(notwithstanding the existence of copyright ownership, the fair use of a copyrighted work, including the reproduction of the work, is allowed for such purposes as criticism, comment, news reporting, teaching, scholarship, or research); Shaw v. Lindheim, 919 F. 2d 1353 (9th Cir. 1990), on remand, 809 F. Supp. 1393 (C.D. Cal. 1992); 17 U.S.C. § 102 (b) (1996)(copyright protection does not extend to facts). Copyright ownership and law notwithstanding, TNC's proprietary interest in the HINHP GIS database as an intrinsically valuable record is protected through the exemption for confidential commercial information. See FOIA Update, Vol. VI, No. 1 at 3-4 (Winter 1985).

<sup>9</sup>Commentary to section 2-103(a)(5) of the Model Code, upon which the UIPA was modeled, makes it clear that the exemption for a disclosure that would give a manifestly unfair advantage to a person to enter into a contract or agreement with an agency was intended to apply to a situation where it is necessary to protect the integrity of the procurement and competitive bidding process. Model Code § 2-103 commentary at 17 (1980). It does not apply here.

<sup>10</sup>This letter does not address the possibility that some other portion of the State GIS might be exempt from disclosure under the UIPA. Should another exception to disclosure apply, that question will have to be raised and addressed in a separate opinion.

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Statutes, and the Office of Planning may segregate the HINHP GIS database before disclosing the State GIS.

Very truly yours,

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Staff Attorney

APPROVED:

Moya T. Davenport Gray  
Director

LMO/sc  
Attachments

c: Honorable Rick Egged  
Suzanne D. Case, Esq.