

October 19, 1999

The Honorable Richard D. Wurdeman
Corporation Counsel
Office of the Corporation Counsel
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720-4262

Attention: Gerald Takase
Deputy Corporation Counsel

Dear Mr. Wurdeman:

Re: Reconsideration of OIP Opinion Letter No. 90-20 Regarding Public
Inspection and Duplication of Building Plans and Permit Applications

This is in reply to a letter from you, via Deputy Corporation Counsel Gerald Takase, requesting that the Office of Information Practices ("OIP") reconsider the advice set forth in OIP Opinion Letter Number 90-20 (June 12, 1990).

ISSUES PRESENTED

- I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), building plans submitted to the Hawaii County Building Department ("Hawaii Building Department") as part of an application for a building permit must be made available for public inspection and copying.
- II. Whether building plans should be open in all cases, or whether it is reasonable to request written authorization from the architects or designers before releasing plans to the public. Whether safeguards can be offered to homeowners who feel their security is being jeopardized.

BRIEF ANSWERS

- I. Yes. Under the UIPA, government agencies must disclose "building permit information" within their control. Haw. Rev. Stat. § 92F-12(a)(11) (Supp. 1998). Based on the legislative history of the UIPA and a liberal construction of section 92F-12(a)(11), Hawaii Revised Statutes, the OIP reaffirms its prior opinion that building permit information, including building plans, must be available for public inspection both before and after a building permit has been granted.

With respect to the duplication of building plans, under the Copyright Act of 1976, 17 U.S.C. § 101-810 (1997) ("Copyright Act"), architectural plans may be subject to copyright protection. However, federal copyright laws do not prohibit the inspection and duplication of copyrighted architectural plans and therefore do not create an exception to disclosure under section 92F-13(4), Hawaii Revised Statutes. Although the U.S. Department of Justice has suggested that disclosure of agency records that are copyrighted does not subject an agency to copyright infringement liability based upon the "fair use" doctrine, the OIP recommends that government agencies seek guidance from the Department of the Attorney General or the County's Corporation Counsel, as appropriate, before permitting the duplication of architectural plans where the agency is on notice that such plans are subject to a registered copyright.

II. No. The UIPA does not require an agency to obtain approval for either inspection or copying of a government record from the party who provided or created the record. See Haw. Rev. Stat. § 92F-11 (1993). Therefore, it would not be proper under the UIPA to require the approval of the architect or designer prior to making copies of government records available.

FACTS

The OIP Opinion Letter Number 90-20 opined that under the UIPA, government agencies must disclose "building permit information" within their control. OIP Op. Ltr. No. 90-20 at 1 (June 12, 1990). In your letter dated January 15, 1997, you asked the OIP to reconsider the OIP's Opinion Letter Number 90-20 based on complaints to your office from homeowners. Apparently, members of the public have been requesting copies of building plans so that they may use them without having to pay for the services of an architect or designer. In addition, these homeowners have stated that the plans sometimes contain "sensitive" information such as safe locations and alarm systems, which if disclosed, may compromise the security of their homes. Architects have also complained to your office that "the plans are protected and should not be released."

In another letter to the OIP dated July 2, 1997, you noted that many of the plans in Hawaii Building Department files are "one-of-a-kind sets, which are drafted by small scale professionals, and not formally copyrighted." You stated that it appears to have become common practice for unscrupulous builders to obtain copies of these plans and avoid paying for their own designers, and you note your concern that government agencies may become "unwilling accomplices to the theft of intellectual property."

The OIP also has received communications from homeowners who are concerned about the safety of their homes because of the potential disclosure of their house plans to individuals who might use the plans for illegal activities such as burglarizing the home. Individuals have also expressed concerns that others may obtain their house plans to build virtually identical homes.

DISCUSSION

I. INTRODUCTION

In OIP Opinion Letter Number 90-20, the OIP was asked by Herbert K. Muraoka, Director for the Building Department of the City and County of Honolulu (“Honolulu Building Department”), whether, under the UIPA, building permit applications and building plans within the control of the Honolulu Building Department are subject to public inspection and duplication.

A. Public Inspection of Building Plans In OIP Opinion Letter Number 90-20

Based on section 92F-12(a)(11), Hawaii Revised Statutes, which mandates disclosure of “building permit information” maintained by government agencies, the OIP determined that the Honolulu Building Department was required to disclose building permit applications and building plans within its control. OIP Op. Ltr. No. 90-20 (June 12, 1990). With regard to the disclosure of building permit information after the issuance of a permit, the OIP reviewed the legislative history of section 92F-12(a)(11), Hawaii Revised Statutes, and found that “the Corporation Counsel for the City and County of Honolulu acknowledged that after a permit is granted, building permit applications, building plans, and permits are “public records.” Id. citing A Bill for an Act Relating to Public Records, Hearing on H. B. No. 2002 before the House Judiciary Committee 14th Leg., Reg. Sess. (1988) (written testimony of Richard D. Wurdeman, Corporation Counsel, City and County of Honolulu, dated February 9, 1988). Thus, based on this legislative history and public policy and law in favor of disclosure, the OIP found that “there is no reason that permit applications and building plans, after the issuance of a permit, should not be subject to disclosure under the UIPA, given their availability before its enactment.” OIP Op. Ltr. No. 90-20 at 5 (June 12, 1990).

The OIP also opined that building permit information is public before a building permit is granted. Disclosure of building permit information was not required under the law prior to the UIPA’s enactment. Had the legislature intended to preclude disclosure of building permit information prior to the issuance of a license, it could have imposed such a limitation when it adopted section 92F-12(a)(11), Hawaii Revised Statutes. See OIP Op. Ltr. No. 90-20 at 6-7 (June 12, 1990). Thus, as the UIPA must be “liberally construed to ‘[p]romote the public interest in disclosure,’ . . . and any doubts in the application of the UIPA’s disclosure provisions must be resolved in favor of disclosure,” the OIP determined that “building permit information,” such as

permit applications and proposed construction plans, is subject to public inspection before the issuance of the permit. OIP Op. Ltr. No. 90-20 at 6 (June 12, 1990).

B. Duplication of Building Plans In OIP Opinion Letter Number 90-20

In the OIP Opinion Letter Number 90-20, the OIP noted that the federal Copyright Act and the Berne Convention Implementation Act of 1988 allow the copyrighting of architectural plans. OIP Op. Ltr. No. 90-20 at 7 (June 12, 1990). The OIP also noted that a federal court addressing the issue of the impact of a copyright on the duty to disclose under the Federal Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), determined that the Copyright Act does not constitute a law that protects government records from disclosure such that the federal counterpart to section 92F-13(4), Hawaii Revised Statutes,¹ applies. OIP Op. Ltr. No. 90-20 at 7-8 (June 12, 1990). The OIP also noted differing positions taken by states and the federal courts on the impact of the Copyright Act on the need to allow duplication under the State’s open records laws and FOIA. See OIP Op. Ltr. No. 90-20 at 8-9 (June 12, 1990). Given the impact of other laws on the need to allow duplication of copyrighted materials and the questions of liability associated therewith, the OIP advised that agencies seek the advice of their Corporation Counsel or the Department of the Attorney General when they are on notice that architectural plans within their control are subject to a registered copyright. Id. at 7-10.

C. Authorization of Building Owner To Disclose In OIP Opinion Letter Number 90-20

The final issue addressed by OIP Opinion Letter Number 90-20 was the Honolulu Building Department’s policy of requiring authorization of the building owner before allowing duplication of building plans, where the Honolulu Building Department was not on notice that the plans were subject to a registered copyright. The UIPA provides that government agencies shall make government records available for inspection and copying under section 92F-11(b), Hawaii Revised Statutes. As with other open records laws, the OIP found that the UIPA does not recognize degrees of disclosure such as permitting inspection but not copying. OIP Op. Ltr. No. 90-20 at 10-11 (June 20, 1990). Therefore, the OIP found that under the UIPA, any record that may be inspected must also be available for copying by the public. Id. at 11. The UIPA does not require consent of the building owner prior to disclosure of building permit information, and disclosure should not be withheld for lack of such consent.

¹ Section 92F-13(4), Hawaii Revised Statutes, provides that government agencies need not disclose “[g]overnment record which, pursuant to state or federal law, including an order of any state or federal court, are protected from disclosure.”

The FOIA counterpart provides that the FOIA does not apply to matters that are “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3).

II. PUBLIC INSPECTION OF BUILDING PLANS

In the OIP Opinion Letter Number 90-20, the OIP relied on section 92F-12(a)(11), Hawaii Revised Statutes, when opining that building permit information, including building plans and permit applications, is public both before and after issuance of a building permit. OIP Op. Ltr. No. 90-20 at 11 (June 12, 1990). Since that opinion was issued, section 92F-12(a)(11), Hawaii Revised Statutes, has not been amended. The government agencies and members of the public that have contacted the OIP on this issue have not cited any new law that would affect this discussion. The OIP conducted further research, but is unaware of any subsequent case law or any other statutory sections that have affected section 92F-12(a)(11), Hawaii Revised Statutes, or our prior opinion. Therefore, we reaffirm our opinion that, under the UIPA, building permit information is public both before and after the issuance of a building permit.

III. DUPLICATION OF BUILDING PLANS

The OIP Opinion Letter Number 90-20 stated that a conclusion that copyrighted materials are not protected from public disclosure under Exemption 3 of FOIA, or under section 92F-13(4), Hawaii Revised Statutes, would present the possibility that an agency would be forced by law to permit or participate in the duplication of a copyrighted work. OIP Op. Ltr. No. 90-20 at 8 (June 12, 1990). This conclusion could subject the agency to an infringement claim by the owner of the copyright. *Id.* The OIP's research did not reveal any Hawaii case law on the duplication of building permit information, so we look now to outside case law for guidance.

Copyrights are meant to provide incentive for the creation of works by protecting the owner's use of intellectual creation, allowing these creators to reap the rewards of their efforts. National Rifle Ass'n v. Handgun Control Federation of Ohio, 15 F.3d 559, 561 (6th Cir. 1994). However, the Copyright Act, and the Berne Convention Implementation Act of 1988, permit the copyrighting of "diagrams, models and technical drawings, including architectural plans."

OIP Op. Ltr. No. 90-20 at 7 (June 12, 1990). In fact, federal courts have noted "[copyright] protection has never accorded the copyright owner complete control over all possible uses of his work." Cable News Network v. Video Monitoring Services of America, 940 F.2d 1471, 1484 (1991 U.S. App.) (citing Sony Corp. v. Universal City Studios, 464 U.S. 417, 432 (1984)). Because not every copyright use violates the rationale of the Copyright Act, and because some uses of copyrighted works are desirable for policy reasons, courts have held that many uses of copyrighted works do not violate the Copyright Act. National Rifle Ass'n v. Handgun Control Federation of Ohio, 15 F.3d 559, 561 (6th Cir. 1994). For example "library photocopying can be 'fair use' in proper circumstances." Williams & Wilkins Co. v. The United States, 203 Ct. Cl. 74, 487 F. 2d 1345, 180 U.S.P.Q. (BNA) 49 (Ct. Cl. 1974), *aff'd* 420 U.S. 376, 95 S. Ct. 1344,

43 L. Ed. 2d 264, 184 U.S.P.Q. (BNA) 705 (1975).

A 1997 opinion of the Florida Attorney General stated that “the fact that the material may be copyrighted does not preclude the material from constituting a public record.” AGO 97-84 (December 18, 1997). The Florida Attorney General then noted that “public agencies are required under the [Florida] Public Records Law to preserve those documents filed pursuant to law with such agencies and to release such documents for inspection and copying.” AGO 97-84 (December 18, 1997). The Florida Attorney General went on to opine:

[u]ntil this issue is clarified, record custodians may release for inspection and copying the architectural and engineering plans that must be filed with the agency pursuant to law. Such custodians, however, should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions.

AGO 97-84 (December 18, 1997).

In a subsequent opinion, the Florida Attorney General stated:

[a] building plan which is labeled a “trade secret” and is filed with a local building department is not exempt from disclosure under [Florida law] merely because it is “computer-generated,” that is, produced pursuant to a computer program or filed on a computer disk.

AGO 97-87 (December 31, 1997).

Using these cases as a guide, we opine as follows. Section 92F-12(a)(11), Hawaii Revised Statutes, requires that building permit information be public. Section 92F-11(b), Hawaii Revised Statutes, requires that government records be available for inspection and copying. Copyrighted material maintained as a government record is subject to the requirements of the UIPA.

The OIP does not have jurisdiction to advise on copyright laws and agencies’ potential liability because copyright is a federal law outside of the UIPA. See Haw. Rev. Stat. § 92F-42 (1993) (powers and duties of the OIP). Therefore, the OIP cannot advise whether allowing

duplication of copyrighted building plans without the authorization of the copyright owner would subject an agency to possible violations of copyright laws.² Likewise, we decline to opine on whether the reproduction of building plans without the authorization of the owner of a registered copyright represents “fair use,”³ because the issue is beyond the scope of the UIPA. OIP Op. Ltr. No. 90-20 at 10 (June 12, 1990). As noted in the OIP’s prior opinion, the U.S. Department of Justice has taken the position that disclosure of agency records that are copyrighted⁴ does not subject an agency to copyright infringement liability based upon the “fair use” doctrine. OIP Op. Ltr. No. 90-20 at 9 (June 12, 1990).

² It should be noted that the U.S. Supreme Court has stated:

[i]t has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States’ sovereign immunity. This Court never awarded relief against a State under any of those statutory schemes. . . . Although the copyright and bankruptcy laws have existed practically since our Nation’s inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States. . . . See Chavez, 59 F.3d at 546 (“We are aware of no case that specifically holds that laws passed pursuant to the Copyright Clause can abrogate State immunity”).

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73 (1996).

³ The Copyright Act lists the following criteria to be considered in determining whether a use of copyrighted material is a fair one:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Courts recognize that this is not an exhaustive list, and that the doctrine of fair use is “an equitable rule of reason.” SEGA Enterprises, Ltd., v. Accolade, Inc., 977 F.2d 1510, 1522 (9th Cir. 1992) (citations omitted) (“SEGA”). In SEGA, the court also chose to consider the public benefit that would result from the alleged copyright infringer’s use of the copyrighted information. Id. at 1523. The court noted that the public benefit need not be direct or tangible, but may arise because the use of the copyrighted information serves a public interest. Id. at 1523.

⁴Individuals may be afforded some measure of copyright protection even if they have not registered a copyright because copyright arises by operation of law when any original work of authorship is fixed in a tangible medium of expression from which it can be perceived. 17 U.S.C. § 102(a). So long as the criteria set forth in 17 U.S.C. § 102(a) are met, copyright protection exists for published and unpublished works. 17 U.S.C. § 104(a). The Copyright Act provides “registration is not a condition for copyright protection.” 17 U.S.C. § 408(a). However, a copyright must be registered for a litigant to file suit for copyright infringement. 17 U.S.C. 411(a);

The OIP believes that the issue of “fair use” is something that must be decided on a case-by-case basis, as each use of copyrighted material is different, and it is up to the copyright owner to assert his or her rights under the law. Therefore, we reaffirm our earlier recommendation in OIP Opinion Letter Number 90-20, that government agencies seek guidance from the Department of the Attorney General or the County’s Corporation Counsel on this issue.

IV. WRITTEN AUTHORIZATION PRIOR TO DISCLOSURE

In your January 15, 1997, letter, you asked whether the Hawaii Building Department may condition disclosure upon written authorization from architects and designers before disclosing their plans to the public. The OIP found, in the OIP Opinion Letter Number 90-20, that an agency cannot require a building owner’s authorization before allowing the duplication of an application for a building permit under the UIPA, as any government record that may be inspected by the public may also be copied. See OIP Op. Ltr. No. 90-20 at 10-11 (June 12, 1990) (citing Haw. Rev. Stat. § 92F-11(b), (d) (1993)). This law has not changed.

In addition, in State of Hawaii Organization of Police Officers v. Society of Professional Journalists-University of Hawaii Chapter, 83 Haw. 397, 927 P.2d 401 (Hawaii 1996) (“SHOPO”), the Supreme Court found that collective bargaining agreements between the City and County of Honolulu and its employees cannot interfere with the rights of a public employer to carry out its public responsibility under the UIPA. See SHOPO, at 410-412. Likewise, government agencies cannot abrogate their responsibilities under the UIPA to make building permit information public by conditioning disclosure upon architect or designer approval of the disclosure.

If the submission of altered or copied building plans is presenting a problem for the Hawaii Building Department, one possible approach to alleviate may be to develop a method of verifying certification stamps of architects, possibly through assistance from architects associations. You may also consider introducing legislation to address these issues.

CONCLUSION

The OIP is sympathetic to concerns by members of the public that building plans may be misused by records requesters. However, section 92F-12 (a)(11), Hawaii Revised Statutes, requires that building permit applications and building plans within the control of government agencies be public. Agencies should consult with their Deputy Attorney General or Deputy Corporation Council regarding photocopying of copyrighted material.

See also Buemi v. Lewis, 51 F.3d 271 (1995 U.S. App.); Cable News Network v. Video Monitoring Services of America, 940 F.2d 1471 (1991 U.S. App.); M.G.B. Homes v. Ameron Homes, 903 F.2d 1486 (1990 U.S. App).

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Very truly yours,

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Staff Attorney

APPROVED:

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CMD: ran

cc: Ben Gonzalez

Ted H.S. Hong, Assistant Corporation Counsel, Hawaii County