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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Safety Systems and Signs Hawaii, Inc.
Agency: Department of Transportation
Date: June 29, 2017
Subject: Zipper Lane Bid Records (U APPEAL 14-20)

REQUEST FOR OPINION

Requester seeks a decision as to whether, under Part II of the UIPA, the Department of Transportation (DOT) properly denied Requester's request for copies of any Statements of Capabilities (SOC) submitted by persons submitting bids (Bidders) on a project for the Furnishing Operation and Maintenance Service for the H-1 Contra-Flow Zipper Lane, Project No. HY-C-22-13 (Project) and any correspondence between DOT and Lindsay Transportation Solutions, formerly known as Barrier Systems, Inc. (Lindsay Transportation), regarding the Project (Project Correspondence).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated November 14, 2013; DOT's letter to OIP dated December 6, 2013; and DOT's e-mail correspondence dated January 25, 2017 and May 10, 2017 and enclosed/attached materials; and the State Procurement Office's (SPO) e-mail correspondence dated June 14, 2017.

QUESTION PRESENTED

Whether DOT is required to disclose Bidders' SOC and the Project Correspondence prior to execution of a contract.

BRIEF ANSWER

Yes, except for personal contact information. DOT was required to disclose the SOC and Project Correspondence once DOT determined that it would be unnecessary for DOT to seek re-bids. While the specific confidentiality or disclosure requirements of chapter 103D, HRS, the Hawaii Public Procurement Code (Procurement Code), should be followed where applicable, the confidentiality provision in section 103D-310, HRS, is applicable only to information submitted under oath on a form of questionnaire prepared by the Procurement Policy Board (PPB), which the SOC and Project Correspondence were not. See HRS §§ 92F-12(b)(1) (2012) (agency must disclose records that are expressly authorized by law to be disclosed); 92F-13(4) (2012) (agency may withhold records protected from disclosure by law); see also HRS § 103D-310 (2012). In the absence of a specific directive in the Procurement Code, OIP looks to the UIPA's frustration exception, section 92F-13(3), HRS, to determine whether procurement information may be withheld. As the information in the records at issue here would not raise the cost of government procurements or give a manifestly unfair advantage to Requester, and it is not detailed financial or commercial information that would likely cause substantial competitive harm, OIP finds that it does not qualify to be withheld under the UIPA's frustration exception. See HRS § 92F-13(3). DOT's promise of confidentiality for the information, by itself, does not override the UIPA's requirements and provide a basis for denial of access. Thus, both the SOC and the Project Correspondence must be disclosed, except for the personal contact information listed in the SOC, which may be redacted based on the UIPA's privacy exception. HRS § 92F-13(1).

FACTS

On June 21, 2013, DOT issued an invitation for bids for the Project. The Notice to Bidders advised that

SEALED BIDS for FURNISHING OPERATION AND MAINTENANCE SERVICE FOR THE H-1 CONTRA-FLOW ZIPPER LANE, ISLAND OF OAHU, PROJECT NO. HWY-C-22-13, will be received at the Contract Office, Department of Transportation, 869 Punchbowl Street, Honolulu, Hawaii 96813, until 2:00 p.m., Hawaii Standard Time (HST), July 18, 2013, at which time and place(s) they will be publicly opened and read.

Section 10.3, Contractor Responsibilities and Requirements of the Project Specifications, required that for “Zipper Machine Operators-The CONTRACTOR shall provide four operators trained and certified by Lindsay Transportation.” Lindsay Transportation was the Zipper Machine’s manufacturer.

Section 10.14 of the Project Specification stated:

The bidder shall complete and sign a Statement of Capabilities form. The completed Statement of Capabilities form, including any attachments shall then be placed in a separate sealed envelope marked “confidential” and submitted to the Department of Transportation . . . prior to bid opening. Failure to submit a thoroughly completed Statement of Capabilities form prior to bid opening may result in the rejection of bids. . . . Upon request, the signed Statement of Capabilities, including any attachments, shall be returned to the bidder after serving its purpose.

Three sealed bids, including one from Requester, were submitted by the deadline and were opened on July 18, 2013. Zip U There, Inc. (ZUT) was the lowest bidder, followed by GP Roadway Systems. Requester had the highest bid. On August 21, 2013, DOT informed ZUT that it would be awarded the contract for the Project.

On August 27, 2013, Requester submitted a letter to the DOT to protest the award of the Project to ZUT (Protest). Requester identified two certified Zipper Machine operators by name and stated that the two individuals were employees of Requester, not ZUT.

On August 27, 2013 and September 5, 2013, Requester made written requests through its attorney to DOT for access to certain records related to the bids for the Project. In its request of September 5, 2013, Requester asked for:

1. Any Statement of Capabilities submitted by the bidders for the “Furnishing Operation and Maintenance Service for the H-1 Contra-Flow Zipper Lane, Project No. HWY-C-22-13” (“Project”). If a claim of confidentiality is asserted, please make available such records with appropriate redaction to the extended [sic] permitted by law.
2. Any correspondence, emails or letters, generated and transmitted by and between the DOT and Lindsay Transportation Solutions (or Barrier Systems, Inc.), from February 1, 2013 to the present, in connection with the Project.

In a Notice to Requester dated September 9, 2013, DOT denied Requester's record request in its entirety. DOT denied access to the SOC and the Project Correspondence, listing the following as its specific grounds:

Frustration of a legitimate government function. Government purchasing information that, if disclosed, would raise the cost of government procurement by giving a manifestly unfair advantage to any person proposing to enter into a contract or agreement with the agency.

The [SOC] required by the solicitation for this project is used by the DOT to determine the responsibility of the Bidder. HRS § 103D-310(d) specifically provides that information furnished by a bidder to support whether it is a responsible bidder shall not be disclosed to any person except to law enforcement agencies. . . .

[OIP] has issued an opinion the facts of which are similar as in this request. Like here, the contract in the OIP opinion had not yet been awarded. The request in the cited OIP opinion was for the offerors' responses to sections of the specifications. . . . In its opinion, the OIP stated, ". . . If one company knew the other companies' details of equipment and personnel, it may be able to use that information to its advantage, or to another bidder's disadvantage."

DOT cited the OIP opinion in question as being "OIP Op. Ltr. No. 09-16"; however, no formal OIP Opinion Letter by that number exists, and it appears that DOT was instead referring to an OIP memorandum opinion numbered as Decision 09-16.

On November 4, 2013, DOT denied Requester's Protest pursuant to section 103D-709, HRS. Requester filed a Request for Administrative Review and Hearing (RFAH) with the Office of Administrative Hearings (OAH) on November 8, 2013.

On November 14, 2013, Requester appealed to OIP DOT's denial of Requester's requests for records. OIP sent DOT a Notice of Appeal and DOT replied on December 6, 2013. In addition to the justifications stated in its Notice to Requester dated September 9, 2013, DOT added two further justifications: (1) it had represented to bidders that the SOC would be kept confidential; and (2) in an unrelated case involving Requester, it had denied another bidder's request to access Requester's SOC.

The OAH dismissed Requester's RFAH on December 19, 2013 for lack of standing. On December 20, 2013, DOT awarded the contract for the Project to ZUT and subsequently executed the contract. Requester then appealed the order dismissing the RFAH. On January 24, 2014, the Circuit Court of the First Circuit

reversed the dismissal by the OAH and remanded the matter to the OAH for a hearing. On March 10, 2014, the OAH issued a Hearings Officer's Findings of Fact, Conclusions of Law, and Decision denying Requester's RFAH.

In an e-mail correspondence dated May 10, 2017, DOT confirmed that the SOC form for the Project was not approved by the Procurement Policy Board. DOT also confirmed that if the lowest bid was withdrawn or did not meet the requirements and criteria for the invitation for bids, the contract would have been awarded to the next lowest bidder. According to DOT, the Project would not have gone out for re-bid in the event that the contract was not awarded to the lowest bidder.

DISCUSSION

I. Applicability of the Procurement Code

DOT argues that disclosure of the SOC is prevented by the confidentiality provisions of section 103D-310, HRS, which states:

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board.

.....

(d) Information furnished by an offeror pursuant to this section shall not be disclosed to any person except to law enforcement agencies as provided by chapter 92F.

HRS § 103D-310 (2012).

The UIPA treats procurement information as being of high public interest, listing it alongside various categories of records set out in section 92F-12(a), HRS, as required to be public; however, unlike other listed records that must be disclosed without exception, "government purchasing information" must be disclosed "except to the extent prohibited by section 92F-13." HRS § 92F-12(a)(3). Thus, notwithstanding the high public interest, the Legislature recognized, in enacting this section, that there may be valid reasons for withholding certain government purchasing information from public disclosure. An agency may withhold government purchasing information where an exception to disclosure applies, as DOT argues is the case here.

The Procurement Code's statutory scheme includes both specific confidentiality provisions, such as the one cited to by DOT, and specific disclosure provisions, such as subsection 103D-302(d), HRS, mandating public disclosure of opened bids. See id. and HRS § 103D-302(d) (2012). The UIPA recognizes and incorporates both statutory confidentiality requirements and statutory disclosure requirements. Specifically, section 92F-13(4), HRS, permits an agency to withhold government records that are protected from disclosure by state or federal law, while section 92F-12(b)(2), HRS, requires an agency to disclose government records that are expressly authorized to be disclosed pursuant to state or federal law. HRS § 92F-12(b)(2) and -13(4). Thus, in determining whether procurement records may be disclosed, OIP looks first to any applicable confidentiality or disclosure provision of the Procurement Code.

Subsection (d) of section 103D-310, HRS, which was invoked by DOT, bars the disclosure of “[i]nformation furnished by an offeror pursuant to this section,” but this statute is limited to responses to “questions contained in a standard form of questionnaire” prepared by the PPB. Id. DOT has confirmed that the SOC involved in this case was not prepared or approved by the PPB. OIP's *in camera* review of the SOC in conjunction with a blank version of the standard form of questionnaire prepared by the PPB indicates that the questionnaire delves into detailed financial information and references well beyond the scope of anything included in the SOC. Furthermore, nothing in the SOC suggests that it was submitted under oath, as the questionnaire protected by section 103D-310, HRS, would be. Finally, in an e-mail correspondence dated June 14, 2017, the SPO asserted “[t]here is nothing inherent in HRS 103D-310, the issue of responsibility, that would preclude release of information” in the SOC. The SPO also clarified that “[o]fferor is a general term that refers to anyone responding to a solicitation, and can include bidders.” Consequently, OIP finds that although section 103D-310, HRS, could potentially apply to records submitted as part of the competitive bidding process, the SOC is not a record covered by section 103D-310, HRS, and OIP therefore concludes that the confidentiality provisions of that section are not applicable to the SOC requested in this case. See HRS §§ 92F-13(4) and 103D-310.

DOT could argue the fact that the questions were not submitted under oath in a questionnaire prepared by the PPB is merely a technical detail and that requiring DOT to disclose that information as contained in a different record would frustrate the purpose of the statute. However, as OIP found based on its *in camera* review referenced above, the type of detailed financial information relating to the bidder's stability that is protected by section 103D-310, HRS, is not equivalent to the project related type of information that was included in the SOC. See pages 11-12 *infra*. Thus, OIP does not find that this section would support an argument that disclosing the SOC would frustrate the legitimate government function recognized by the statute. See HRS §§ 92F-13(3) and 103D-310.

The remaining provision of the Procurement Code of potential relevance is section 103D-302, HRS, relating to competitive sealed bidding. Subsection (d) specifically provides that after the bids have been publicly opened, each bid shall be open to public inspection. Thus, OIP must determine whether the SOC and Project Correspondence are part of the bids, and as such required to be open to public inspection. The Project Correspondence was not submitted by a Bidder and thus OIP sees no reason to consider it part of a “bid.” Since each Bidder was required to submit an SOC to DOT prior to the opening of bids, the SOC could be considered part of the bid package; however, the SOC and any attachments were required to be submitted separately from the bid itself and marked “confidential.” OIP therefore concludes that although each Bidder was required to submit an SOC for the bid to be considered, the SOC was not itself part of the “bid” required to be publicly opened and recorded, and subsequently kept open for public inspection, so section 103D-302, HRS, does not mandate public disclosure of the SOC. See HRS §§ 92F-12(b)(2) and 103D-302(d).

In the absence of a dispositive provision of the Procurement Code, OIP next looks to the UIPA’s own exceptions to see if they provide a basis for DOT to withhold the SOCs and Project Correspondence.

II. Frustration of a Legitimate Government Function

OIP understands DOT’s remaining arguments to fall under the UIPA’s exception for “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” HRS § 92F-13(3) (2012). DOT has provided several different theories of why disclosure would frustrate a legitimate DOT function, which OIP will address in turn.

A. Promise of Confidentiality

DOT asserts that when it solicited bidders to submit their SOC, it represented to the bidders that their SOC would be kept confidential. Hence, DOT argues that disclosure of the SOC would “frustrate” the procurement process because DOT would be breaking its promise of confidentiality to the Bidders.

In OIP Opinion Letter No. 05-05, however, OIP recognized the limited application of the frustration exception to promises of confidentiality and stated

in previous OIP advisory opinions, OIP has established that **it is the UIPA itself that allows an agency to withhold information in government records, not the express or implied promises of confidentiality made by an agency.** See OIP Op. Ltr. No. 93-16 (Oct. 1, 1993) (UIPA prohibits disclosure of residential addresses, not

the express or implied representations of agency staff or the application form); OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (agency may not make a promise of confidentiality that would circumvent disclosure requirements of the UIPA).

OIP Op. Ltr. No. 05-05 at 3 (emphasis added). Thus, the SOC cannot be withheld from public disclosure merely because DOT gave express assurances of confidentiality.

B. Manifestly Unfair Advantage; Bids Versus Proposals

DOT asserts that it was not required to release the results of bids or documents received as part of the bid process until a contract was awarded because such disclosure would raise the cost of government procurement by giving a manifestly unfair advantage to any person proposing to enter into a contract or agreement with the agency. In support of this argument, DOT relies on a memorandum opinion, OIP Decision 09-16¹, which held that records submitted in the course of a procurement done by competitive proposals need not be disclosed before the contract was final. That memorandum opinion followed OIP Opinion Letters Number 90-02 and 91-21, which are formal, precedential opinions concluding that information about **competitive proposals** generally may be withheld until after execution of a contract to avoid frustration of a legitimate government function. In addition to those opinions, OIP Opinion Letter Number 94-18 discussed at some length the potential for premature disclosure of information about proposals to raise procurement costs and provide competitors with a manifestly unfair advantage, particularly where, as in that opinion, there were post-evaluation negotiations ongoing with a specific offeror and in the event those negotiations broke down the remaining offerors would be advantaged by knowing the relative strength of their negotiating positions. OIP has not applied the manifestly unfair advantage concept to disclosure of information about **competitive bids** prior to execution of a contract; OIP Opinion Letter Number 90-15, which dealt with component prices set forth in a lump sum bid under the now-repealed section 103-27, HRS, notably did not even raise or consider the question of whether such disclosure would present a manifestly unfair advantage to other bidders. See OIP Op. Ltr. No. 90-15.

The line of OIP opinions dealing with the manifestly unfair advantage resulting from premature disclosures of information about proposals are inapposite

¹ Only OIP's formal or published opinions are considered precedential. HAR § 2-72-17(d). Informal or memorandum opinions, such as the one cited to by DOT, "shall not be considered as precedent, but may be considered for other purposes." Thus, DOT's reliance on a memorandum opinion is misplaced, except to the extent that DOT cites it to demonstrate that DOT's denial of access was made in good faith. Requester has not argued that DOT's denial was not made in good faith, nor does OIP see any basis to so conclude.

here, as there is a significant statutory distinction between the process set out for awarding a contract in requests for **proposals**, as discussed in those opinions as well as the memorandum opinion, and the process set out for requests for **bids**, as was at issue here.

Competitive sealed **proposals** are governed by section 103D-303, HRS, which provides in relevant part

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of evaluation. A register of proposals shall be prepared and shall be open for public inspection after contract award.

...

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably likely to be selected for a contract award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

HRS § 103D-303 (2012) (emphases added).

By contrast, section 103D-302, HRS, governs “competitive sealed **bidding**,” and states in relevant part

(a) Contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301. Awards of contracts by competitive sealed bidding may be made after single or multi-step bidding. Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids.

...

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.

...

(h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder

whose bid meets the requirements and criteria set forth in the invitation for bids.

HRS § 103D-302 (2012) (emphases added).

Unlike the competitive proposal process that protects proposals from premature disclosure and **allows for ongoing discussions** between the procuring agency and the offerors during the process, the **competitive bidding process** is governed by section 103D-302, HRS, which **expressly states that there can be no negotiations** after the receipt and opening of bids that must be opened publicly and thereafter be open to public inspection. Thus, the potential for frustration of the procurement process by disclosure of information before a contract has been signed depends on the type of procurement process being followed.

This case involves a competitive bidding process and DOT has confirmed that there would have been no re-bid if the lowest bid was withdrawn or did not meet the requirements and criteria in the invitation for bids. Instead, the contract would have been awarded to the next lowest bidder. As all bids had been opened publicly on July 18, before Requester's first request for documents on August 27, there was no need for confidentiality and the bid records were expressly open to public inspection under HRS § 103D-302(d). Bidders could not use information about the other bids to gain an unfair advantage in their negotiations with DOT because such negotiations were expressly forbidden by statute at that point. Consequently, OIP concludes that even before a contract was executed, disclosure of information about the bids would not have raised the cost of procurement by providing a manifestly unfair advantage to other bidders and thus frustrate a legitimate government function, so DOT cannot withhold information about the bids on that basis. See HRS § 92F-13(3).

C. Confidential Commercial or Financial Information

Even after the point where disclosure of information in procurement records would no longer provide a manifestly unfair advantage to others – whether because the winning proposal has been selected and the contract executed or because the bids have been publicly opened – some information in procurement records may still fall under the UIPA's frustration exception as confidential commercial or financial information. As OIP has previously explained regarding this form of frustration:

[i]nformation is “commercial” when “the party submitting the information has a commercial interest in it, or if the record pertains or relates to, or deals with commerce.” OIP Op. Ltr. No. 97-09 at 8 (December 17, 1997). Information is “confidential” when its “disclosure would either likely (1) impair the government's future ability to obtain necessary information, or (2) substantially harm the competitive

position of the person who provided the information.” OIP Op. Ltr. No. 98-2 at 10 (April 24, 1998). A person submitting information suffers substantial competitive harm when “(1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm.” Id. at 12.

OIP Op. Ltr. No. 01-02 at 5. More recently, OIP explained the need for an agency to justify how information would potentially cause substantial competitive harm to meet its burden to establish that this form of frustration applies, particularly where the information is not financial in nature:

Especially when the specific type of information at issue is not one that has been the subject of prior OIP opinions, an agency needs to provide specific and direct evidence of the potential for competitive harm in order to provide a basis for “beneficial scrutiny” of its allegations. OIP Op. Ltr. 94-17 at 14-15; see also OIP Op. Ltr. 98-2 at 12-15 (concluding that because business submitted only conclusory allegations and failed to show how disclosure of information would lead to substantial competitive harm, disclosure would not cause substantial competitive harm). An agency cannot use the presence of some protected information – for instance, cost and overhead information – to justify a wholesale redaction of all information. See OIP Op. Ltr. No. 94-17 at 15 (noting that information withheld as “costs” also included extensive narration of various events); see also HAR § 2-71-17 (requiring that when a record contains both confidential and public information, agency has a duty to segregate the confidential portion and disclose the rest to the extent reasonably possible) and OIP Op. Ltr. No. 09-09 (stating that “an agency may withhold an entire record only where the record is not reasonably segregable,” citing OIP Op. Ltrs. No. 90-11 and 95-13).

OIP Op. Ltr. No. 17-02 at 9 (footnote omitted).

Here, the SOC contained information from bidders regarding

- a. The names, telephone numbers, dates of certification, years of experience operating a Zipper Machine, and locations of experience of four individuals trained and certified by Lindsay Transportation to operate the Zipper Machine;
- b. Equipment and personnel capable of maintaining and repairing the Zipper Machine;
- c. Equipment to lift, move and transport barriers;
- d. Capability and equipment necessary to perform all work specified;
- e. Vehicles that meet the requirements;

- f. Required business and tax licenses to conduct business in the state of Hawaii; and
- g. Bidder's Oahu address, phone number and e-mail address.

The Project Correspondence contained related, though less extensive, information.

Because the Project Correspondence and the SOC all relate to a competitive bidding process, OIP concludes that the information contained in them is commercial in nature, and further, that all the bidders who submitted information face actual competition. However, based on its *in camera* review, OIP finds that the information in those records does not consist of the sort of detailed financial or commercial information that would likely cause substantial competitive harm, and thus it does not approach being "confidential commercial and financial information" that could be withheld under the UIPA's frustration exception. See HRS § 92F-13(3). OIP therefore concludes that the SOC and the Project Correspondence cannot be withheld as confidential commercial or financial information protected by the "frustration of a legitimate government function" exception. Id.

III. Privacy

Finally, although DOT did not raise the UIPA's privacy exception as a basis for its denial, OIP notes that the SOC contained what appeared to be the home telephone numbers of individual Zipper Machine operators. Any home telephone numbers or other personal contact information may be withheld under the UIPA's exception for information whose disclosure would be an unwarranted invasion of personal privacy. HRS § 92F-13(1); OIP Op. Ltr. No. 90-10 at 9.

Apart from this limited category of information, OIP concludes that none of the exceptions to disclosure under UIPA are applicable to the SOC or the Project Correspondence. DOT must therefore disclose the requested records to Requester, with only the personal contact information redacted.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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