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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: Logan Johnsen Halas
Agency: Honolulu Department of Budget and Fiscal Services
Date: April 24, 2019
Subject: Appraisal Report for Possible Easement (U APPEAL 16-34)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Department of Budget and Fiscal Services of the City and County of Honolulu (City) (BFS) properly denied her request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated April 22, 2016, and attached materials; a letter from BFS to OIP dated May 11, 2016, and attached materials; Requester's email to OIP dated June 23, 2016; OIP's letter to Requester and BFS dated January 2, 2019; Requester's email to OIP dated January 3, 2019; a letter dated February 1, 2019, from BFS to OIP; and OIP's notes of a telephone conversation with BFS's Deputy Corporation Counsel on March 13, 2019.

QUESTION PRESENTED

Whether an appraisal report prepared for the sale of an interest in county land must be disclosed to the public upon request under the UIPA.

BRIEF ANSWER(S)

Yes. Although appraisal reports relating to the sale of an interest in county land are not made public by statute, as appraisal reports prepared for State of Hawaii (State) lands are, OIP cannot logically conclude on the basis of that distinction that disclosure of appraisal reports would provide a manifestly unfair advantage to purchasers of interests in county land when disclosure of similar reports does not provide a manifestly unfair advantage to purchasers of interests in State lands. See HRS § 92F-13(3) (2012) (UIPA exception for records whose disclosure would frustrate a legitimate government function); HRS § 171-17(e) (Supp. 2018) (specifying that appraisal reports for State lands are public); OIP Op. Ltr. No. 91-10 (concluding it would be illogical to distinguish effect of disclosure of appraisal reports prepared to set lease prices, made public by statute, from those prepared to set permit prices, not addressed by statute, and therefore no UIPA exception applied to either). Thus, appraisal reports relating to the sale of an interest in county land do not fall under the UIPA's exception for records whose disclosure would frustrate a legitimate government function and they must be publicly disclosed upon request under the UIPA.

FACTS

Requester is an owner of a landlocked kuleana¹ lot, for which she and her family seek to purchase an easement over the City's Kahaluu Flood Control maintenance road for legal access and water to Requester's lot.² According to Requester, BFS appraised the easement value at \$300,000. Seeking to understand the basis for this appraisal, Requester asked BFS for a copy of the appraisal report prepared for it by the City Department of Design and Construction (DDC), which included market analysis and a value range "as a guideline for negotiation purposes."

In its response to this appeal, BFS initially argued that the appraisal report could be withheld under the UIPA's exception for records whose disclosure would

¹ "Kuleana' means 'a small area of land such as were awarded in fee by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor.'" Bremer v. Weeks, 104 Hawai'i 43, 46 n.5, 85 P.3d 150, 153 n.5 (2004) (citation omitted). The Hawaii Supreme Court has recognized kuleana owners' entitlement under section 7-1, HRS, to a right of way based on necessity, or ancient or historical use. See id. at 42-51 (discussion of prior cases recognizing kuleana owners' entitlement to a right of way).

² Requester's complaint to OIP also alleged that her lot is already entitled to access and water rights, and that BFS is trying to charge for what are legal recorded rights. The question of the lot's legal entitlement to access and water rights is beyond OIP's jurisdiction and thus is not considered in this opinion.

frustrate a legitimate government function for two reasons: first, the appraisal report contained predecisional and deliberative interdepartmental communications falling within the deliberative process privilege form of frustration, and second, its disclosure to Requester in particular would frustrate BFS's "legitimate government function of negotiating and ultimately determining a fair purchase price for City assets." See HRS § 92F-13(3).

OIP subsequently notified BFS that based on Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018), OIP would no longer recognize the deliberative process privilege under the UIPA's frustration exception and offered BFS the opportunity to supplement its position in light of that decision. In response, BFS abandoned its argument that the appraisal could be withheld under the UIPA's frustration exception based on the deliberative process privilege. At the same time, BFS reiterated its other argument, that the appraisal report was created to provide the basis for BFS's strategy in negotiating a purchase price for the requested easement and disclosure of the range of values in the appraisal report would frustrate BFS's ability to achieve a fair purchase price for the easement. See HRS § 92F-13(3).

DISCUSSION

I. Law Regarding Appraisal Reports for Sale or Lease of State Lands

Both by statute and based on prior OIP precedent, it is clear that appraisal reports prepared for the sale or lease of State lands (including the negotiated sale of an easement) are open to the public. Section 171-17(e), HRS, currently provides that for State lands,

Complete appraisal reports, including all comparables relied upon in the appraisal reports, shall be available for study by the public.

HRS § 171-17(e) (Supp. 2018). Applying an earlier version of this provision, OIP wrote in OIP Opinion Letter Number 91-10:

Section 171-17(f), Hawaii Revised Statutes, which requires that all appraisal reports used in fixing the fair market rental of public land leases be available for public study, has remained unchanged since enacted by the First Legislature as part of Act 32, 1962 Haw. Sess. Laws 95, which created a comprehensive statutory scheme for the administration, management, and disposition of public lands of the State of Hawaii. See Act 32, 1962 Haw. Sess. Laws 95.

The legislative history of Act 32 indicates that "[e]very consideration has been given throughout the bill, particularly in the disposition sections, to adequately preserve the assets of the State by

authorizing only leases disposable by public auction.” H.R. Stand. Comm. Rep. No. 240, 1st Leg., 1962 Reg. Sess., Haw. H.J. at 356 (1962). Although the legislative purpose underlying subsection (f) of section 171-17, Hawaii Revised Statutes, is not clear, the First Legislature may have determined that requiring public access to appraisals used to negotiate lease rent upon public lands would further the Act's purpose to “preserve the assets of the State,” by subjecting lease rent negotiations to public scrutiny.

OIP Op. Ltr. No. 91-10 at 7.

In addition, when section 171-17(e), HRS, was most recently amended by Act 168 of 2014, the Senate Judiciary Committee observed that disclosure is fairer to the lessee:

The release of the initial appraisal commissioned by the Department of Land and Natural Resources to arrive at a proposed lease rent provides the lessee with the opportunity to review the report before making a decision to accept or reject the rent. This action is fair and allows the lessee to make an informed decision, which is always preferable[.]

S. Stand. Comm. Rep. No. 3077, 27th Leg., 2014 Reg. Sess. (March 21, 2014), https://www.capitol.hawaii.gov/session2014/commreports/HB1823_HD1_SSCR3077_.PDF.

II. Law Regarding Appraisal Reports for Sale of County Lands

By statute, “each county, subject to the approval of the council, may grant, sell, or otherwise dispose of any easement . . . by direct negotiation or otherwise. . . .” HRS § 46-66 (supp. 2018). The City’s procedures for disposal of real property are set out in Chapter 37, Revised Ordinances of Honolulu (ROH), but the easement at issue in this appeal, which is not an easement for access to the ocean, is not “real property” subject to chapter 37. See ROH § 37-1.1 (definition of real property “does not include . . . any easement other than an easement for access to the ocean.”) Nonetheless, the procedures set out in chapter 37, ROH, may be used for the sale of an easement for an easement that is not for access to the ocean. ROH § 37-1.10.

In other words, BFS was authorized but not required to follow the procedures set out in chapter 37, ROH, for the sale of the proposed easement discussed in the appraisal report at issue here. Those procedures include preparation of an appraisal report when so requested by the City Council. ROH § 37-1.9. Chapter 37 is silent on the question of disclosure of appraisal reports: it does not require either disclosure or nondisclosure of an appraisal prepared under section 37-1.9, ROH.

III. Disclosure of Appraisal Reports as a Frustration of a Legitimate Government Function

OIP has previously recognized that section 92F-13(3), HRS, the UIPA's exception for records whose disclosure would frustrate a legitimate government function, applies to information whose disclosure would likely raise the cost of government procurement. E.g. OIP Op. Ltr. No. 09-02 at 4. As a general rule, even when the government agency is the seller rather than the purchaser, OIP finds that it is still a legitimate function of a government agency to be a prudent steward of public assets, whether they comprise government funds, public lands, or other government property. See HRS § 92F-13(3). OIP also agrees with BFS that disclosure of the range of potential values for the easement, and the market analysis that produced that range of values, will impair BFS's ability to negotiate the highest possible purchase price. The market price for the easement, according to the appraisal report, could be anything within the range of values set out in the report. Disclosure of this range of values would tell Requester the lowest price BFS was willing to accept, and Requester would presumably be unwilling to offer anything higher than that, thus eliminating any room for BFS to negotiate a higher price for the proposed easement. However, given the statutory landscape and OIP's prior opinion regarding property appraisals, OIP cannot simply conclude from this that BFS may withhold that information to avoid frustration of a legitimate government function, but must also look to legislative intent behind the UIPA with specific regard to property appraisals, and to whether there are other equally legitimate government functions that would not be frustrated but rather promoted by disclosure of property appraisals.

OIP has previously found that disclosure of appraisal reports for **State** lands would not frustrate a legitimate government function. OIP Op. Ltr. No. 91-10 at 8-11. Because some of the reports at issue arguably did not fall under the statutory disclosure mandate of what was then section 171-17(f), HRS, OIP looked to whether the UIPA's frustration exception might apply. Id. The opinion noted that the UIPA's legislative history had provided two related examples of information falling under the UIPA's frustration exception:

Senate Standing Committee Report No. 2580, March 18, 1988, provides examples of government records the Legislature considered eligible for protection under this UIPA exception. Two examples in the Senate Standing Committee report merit examination in view of the nature of the government records at issue:

(b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

.....

- (3) Information which, if disclosed, would raise the cost of government procurement or give a manifestly unfair

advantage to any person proposing to enter into a contract or agreement with an agency [. . .]

- (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;

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

Id. at 8. Observing that the appraisals at issue did not “identify property that is ‘under consideration for possible future public acquisition,’” and considering the statutory requirement to publicly disclose appraisals similar to those at issue, the opinion stated that it would be “illogical and contrary to common sense” to conclude that “disclosure of one appraisal and not the other . . . would frustrate a legitimate government function by giving permittees but not lessees a manifestly unfair advantage[.]” Id. at 10.

At the time the UIPA was created in 1988, appraisal reports regarding State lands, at least, had long been available to the public. See Act 32, 1962 Haw. Sess. Laws 95. Subsequent legislation and legislative history in this area shows the Legislature broadening the scope of what is explicitly public based on the assumption that it is preferable to allow a lessee of government land to make an informed decision to accept or reject a proposed rent.

In contrast, the City considered appraisal reports confidential at the time the UIPA was passed. The Governor’s Committee on Public Records and Privacy, which reviewed public access to various records before recommending the legislation that ultimately become the UIPA, did not make a recommendation one way or the other as to treatment of property appraisals but did mention then-Honolulu Managing Director Jeremy Harris’s belief that appraisals “should . . . remain confidential” based on the City’s then-current Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies. Report of Governor’s Committee on Public Records and Privacy, Vol. I, p. 104, and Vol. III, p. 369, 374 (1987). Thus, at the time the UIPA was enacted, there was a conflict between the treatment of appraisal reports for sale of an interest in State land, which had long been public, and appraisal reports for sale of an interest in county land, which were not affirmatively public and at least in the City’s case were considered confidential.

The Legislature declared when it established the UIPA, “it is not the intent of the Legislature that this section [setting forth exceptions to access] be used to close currently available records, even though these records might fit within one of the categories in this section.” S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess. Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988); see also OIP Op. Ltrs. No. F15-01 at 9, 02-04 at 7, and 90-36 at 12-13

(recognizing legislative intent that public records remain public upon enactment of UIPA). Consistent with that intent and as OIP has previously concluded, appraisal reports of State lands, which had long been public, remained public after passage of the UIPA. The question now before OIP is whether public disclosure of a county appraisal report would give a manifestly unfair advantage to the prospective purchaser and thus allow a county agency to withhold the appraisal report under the UIPA's frustration exception, even though the Legislature has determined that in the case of appraisal reports for State lands, mandatory disclosure of such reports is fair and allows for informed decisions.

OIP finds the only distinguishing feature between appraisal reports for State and county lands to be the lack of an explicit statutory disclosure requirement for appraisal reports for the sale or lease of an interest in county lands. In the absence of a meaningful factual difference between the relative standing and resources of the parties to the sale or lease of an interest in State versus county lands, OIP cannot conclude that public disclosure of the relevant appraisal reports regarding county lands would give a manifestly unfair advantage to prospective purchasers or lessees while public disclosure of the equivalent reports for State lands is required and is considered to be fair to all concerned. As with the appraisal reports prepared to set prices for prospective permits versus prospective leases that OIP considered in OIP Opinion Letter Number 91-10, it would be "illogical and contrary to common sense" to conclude that "disclosure of one appraisal and not the other . . . would frustrate a legitimate government function" by giving prospective county purchasers or lessees but not prospective State purchasers or lessees a manifestly unfair advantage. See OIP Op. Ltr. No. 91-10 at 10. To the contrary, OIP agrees with the Senate Judiciary Committee's observation regarding disclosure of appraisal reports related to leases of State lands that release of such appraisal reports allows a prospective purchaser or lessee of an interest in public lands to understand the basis for the price offered and to make an informed decision. OIP further notes that disclosure of appraisal reports serves the strong public interest in knowing whether sales and leases of government lands are being priced fairly based on a market assessment, rather than either giving sweetheart deals or overcharging purchasers or lessees.

For these reasons, OIP concludes that the disclosure of an appraisal report relating to the sale of an interest in City land would not frustrate a legitimate government function such that it may be withheld under the UIPA's frustration exception. See HRS § 92F-13(3). The City must therefore disclose the requested appraisal report.

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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