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February 9, 2004

Ms. Pearl Imada Iboshi
Administrator, Research and Economic
Analysis Division
Department of Business, Economic
Development and Tourism
No. 1 Capitol District Building
250 South Hotel Street, Suite 435
Honolulu, Hawaii 96813

Re: Tourism Data

Dear Ms. Iboshi:

In your memorandum of November 9, 1999, you asked the Office of Information Practices ("OIP") to respond to questions regarding the application of section 201-13.8, Hawaii Revised Statutes ("HRS") and the Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA").

ISSUES PRESENTED

I. Can the Department of Business, Economic Development and Tourism ("DBEDT") charge a requester for segregating information that a business has designated, with DBEDT's concurrence, as proprietary and subject to withholding under the UIPA?

II. If a second person requests the same record, can DBEDT also charge the second requester for segregating the same information?

III. Can DBEDT selectively disclose, to only Hawaii businesses, compiled information that does not identify specific businesses or include competitively sensitive information?

IV. Can DBEDT selectively charge a requester the market value of requested information, and if not, would legislation be required to sell information at market value to a specific group of requesters?

BRIEF ANSWERS

I. Yes, assuming that the information segregated does indeed fall within an exception to disclosure under the UIPA.

II. No, if DBEDT still has an already-segregated copy of the record.

III. No. In the absence of a statute authorizing selective disclosure, access to public records may not be restricted to only those requesters who intend to use the information for certain purposes.

IV. No. Unless an agency has specific statutory authority to sell information at market value, it may not do so. The UIPA permits only fees for search, review and segregation functions and other lawful fees (such as for copies and postage).

FACTS

DBEDT collects tourism data from businesses and other sources, including individually identifiable information and competitively sensitive information about specific businesses in the visitor industry. DBEDT then compiles the information for its research and analysis. In addition, DBEDT sometimes receives record requests for compilations, which may include confidential information.

The compilations prepared by DBEDT for its own research and analysis may no longer identify specific businesses or specific competitively sensitive information about a business. However, even if a compilation prepared by DBEDT no longer contains competitively sensitive information specific to a particular business, DBEDT believes that the compilation itself could place the Hawaii visitor industry at a competitive disadvantage to other, non-Hawaii visitor destinations. DBEDT also believes that the compilations it prepares have significant market value.

DISCUSSION

I. INTRODUCTION

As information maintained by an agency in written and electronic form, DBEDT's database and compiled reports are government records subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (1993) (definition of "government record"). Under the UIPA, all government records are open to the public unless an exception under section 92F-13, HRS, applies. See Haw. Rev. Stat. § 92F-11 (1993).

Consistent with other state and federal open records laws, the UIPA imposes upon the agency the burden of proving that an exception to disclosure applies. See Haw. Rev. Stat. § 92F-15(c) (1993); see also OIP Op. Ltrs. No. 91-15 at 8 (Sept. 10, 1991); 94-11 at 5 n. 1 (June 24, 1994); 94-18 at 10 (Sept. 10, 1994); 95-5 at 3 n. 1 (March 9, 1995); 95-21 at 8 n. 1 (Aug. 28, 1995)

II. SEGREGATING CONFIDENTIAL BUSINESS INFORMATION

DBEDT allows businesses providing information to DBEDT to designate information that they consider proprietary, and DBEDT reviews the designations and determines whether it believes the information is subject to withholding either as confidential business information under section 92F-13(3),[1] HRS, or as competitively sensitive information protected by section 201-13.8(c),[2] HRS, and thus subject to withholding under section

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[1] Confidential business information falls within the UIPA's exception for information whose disclosure would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993). For a more complete discussion of the frustration exception as applied to confidential business information, see OIP Op. Ltr. No. 98-2 (April 24, 1998).

[2] Section 201-13.8(c), HRS, provides:

> Public disclosure of information gathered by the department could place businesses at a competitive disadvantage. Consequently, where disclosure would result in the impairment of a legitimate government function, the department may withhold from public disclosure competitively sensitive information including:
>
> (1) Completed survey and questionnaire forms;
> (2) Coding sheets; and
> (3) Database records of such information.

Haw. Rev. Stat. § 201-13.8(c) (Supp. 2003).

92F-13(4),[3] HRS. As DBEDT has not asked OIP for an opinion on whether it may withhold any specific records, OIP assumes for the purpose of this opinion that DBEDT is correct when it determines that it has the discretion to withhold designated proprietary information from disclosure.

OIP notes that the UIPA does not require DBEDT to prepare a compilation of its records in response to a record request "[u]nless the information is readily retrievable . . . in the form in which it is requested." Haw. Rev. Stat. § 92F-11(c) (1993). OIP also notes that DBEDT runs compilations of the data it maintains as part of its usual activities, which suggests that the segregated compilation would be readily retrievable and thus required under the UIPA. If the "special run" of the requested information, minus the segregated information, may be accomplished without an unusual effort – in other words, the information is readily retrievable – then DBEDT may charge only the fees it is permitted under the UIPA. If, however, the information is not readily retrievable – for instance, if the "special run" would require bringing someone in to reprogram the database – then the UIPA would not require DBEDT to prepare the compilation. In that case, the UIPA's fee structure would not apply, and DBEDT would have the option of either declining to provide the requested compilation on the grounds that it was not readily retrievable, or of working out its own arrangement with the requester, such as asking the requester to pay the cost of reprogramming.

Assuming that a requested "special run" compilation is readily retrievable and thus subject to the UIPA, DBEDT may, pursuant to section 2-7-31(a), Hawaii Administrative Rules ("HAR"), assess fees to segregate information that is subject to withholding under the UIPA. The allowable fees for search, review, and segregation are:

> $2.50 per fifteen minutes to search for the data; and
> $5.00 per fifteen minutes to review and segregate the data.

Haw. Admin. R. § 2-7-31(a) (1999). However, the first $30 of assessments under this section must be waived. Id. Additionally, if the request is in the public interest, then a total of $60 may be waived under section 2-7-32, HAR. Determination of the public interest is made at the discretion of the agency but following the guidelines established by section 2-71-32, HAR.

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[3] Records protected by other laws may be withheld under section 92F-13(4), HRS.

If a second requester were to request the same segregated record as an earlier requester, and DBEDT had the already-segregated record available, then DBEDT could not charge the second requester fees for the segregation because it would not need staff time to segregate the already-segregated record. If, on the other hand, DBEDT no longer had a segregated copy of the record, then DBEDT could charge whatever segregation fees were permitted under the UIPA for the staff time necessary to again segregate the record.

OIP encourages all government agencies to minimize the public's cost of access to public records. If a particular segregated record is in public demand, OIP therefore recommends that DBEDT keep a segregated copy on hand so that it need not re-segregate the record with every new request. In addition, OIP recommends that DBEDT collect and maintain competitively sensitive information in a manner that allows easy segregation before public disclosure, so that DBEDT need not impose significant fees for time spent segregating data.

III. DISCLOSURE OF PUBLIC RECORD DATA

DBEDT creates compilations of data that, although based on competitively sensitive information from Hawaii businesses, no longer identify individual business or individual pieces of competitively sensitive information. DBEDT believes that general release of the compiled information would, however, place the Hawaii visitor industry as a whole at a competitive disadvantage to other visitor destinations. Thus, DBEDT's argument is that withholding compilations from non-Hawaii businesses may be justified under either section 201-13.8 or section 92F-13(3), HRS.

The UIPA's frustration exception, as applied to confidential business information, requires that disclosure of the information "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." E.g. OIP Op. Ltr. No. 98-2 at 10 (April 24, 1998) (discussing the confidential business information form of the frustration exception, section 92F-13(3), HRS). DBEDT has not argued that disclosure of compilations would impair its future ability to obtain necessary information. With respect to competitive harm, the focus is on the competitive harm

disclosure would do to a particular business (a "person") who submitted information, not competitive harm to the collection of businesses that make up a local industry. Similarly, the statutory protection in section 201-13.8, HRS, for "competitively sensitive information" collected by DBEDT, lists protected records that are identifiable to a specific business: the statute specifically refers to completed survey and questionnaire forms, coding sheets, and database records of the same information. Haw. Rev. Stat. § 201-13.8(c) (Supp. 2003). Although the list is not exclusive, the statute gives no indication of an intent to protect compiled information that is no longer identifiable to a specific business. See id. Thus, based on the information DBEDT has provided, neither section 92F-13(3) nor section 201-13.8, HRS, would justify withholding a compilation that does not identify individual business or individual pieces of competitively sensitive information on the basis that the compilation could cause competitive harm to the Hawaii visitor industry as a whole by providing an advantage to other visitor destinations.

When no exception to disclosure applies to a record, the UIPA uses an "any person" standard in determining who may obtain access to it. Thus, in OIP Opinion Letter No. 90-35, OIP concluded that a government agency may not limit access to public records based on proposed use, in the absence of a statute authorizing the limitation of access. The Board of Land and Natural Resources had asked OIP whether the Commission on Water Resource Management ("Commission") could limit access to an electronic mailing list to those who promised not to use it for commercial purposes. OIP wrote:

> Like the federal Freedom of Information Act, 5 U.S.C. § 552 (Supp. 1989) ("FOIA"), and other state open records laws, under the UIPA, the purpose for which a record is sought is generally irrelevant. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1989) ("upon request of any person"); OIP Op. Ltr. No. 90-9 (Feb. 26, 1990); Aronson v. U.S. Department of Housing & Urban Development, 822 F.2d 182, 186 (1st Cir. 1987) ("[c]ongress granted the scholar and scoundrel equal rights of access to agency records"); Columbia Packing Co. v. U.S. Department of Agriculture, 563 F.2d

> 495, 499-500 (1st Cir. 1977) (the rights of a party seeking access "are not lessened, any more than they are enhanced, by the private purposes for which the documents are sought"); see also U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) (public access turns on nature of the requested document "rather than on the particular purpose for which the document is being requested"); Techniscan Corp. v. Passaic Valley Water Commission, 549 A.2d 233 (N.J. 1988) (for profit records searchers have equal rights of access under "Right-to-Know Law").

Using these cases as guidance, OIP concluded that "under the UIPA an agency may not restrict access to government records which are "public" to requesters who intend to use the information for commercial purposes, in the absence of a statute authorizing the same." OIP Op. Ltr. 90-35 at 14 (Dec. 17, 1990). Similarly, DBEDT may not limit disclosure of public records to Hawaii businesses, but must disclose them to any requester.

IV. FEES TO ACCESS RECORDS

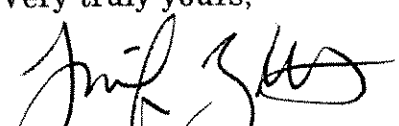
Legislation would be required to sell governmentally held public record information at market value, either in a discriminatory fashion or to all requesters. The UIPA permits an agency to charge fees for search, review and segregation functions as mentioned in Part II of this letter, as well as "other lawful fees" such as the copy charges permitted by section 92-21, HRS. See Haw. Admin. R. § 2-71-19(a). DBEDT would need statutory authorization to charge fees based on market value in place of the fees permitted under the UIPA, as well as to discriminate between requesters in the fees charged.

CONCLUSION

DBEDT may charge fees as permitted by chapter 2-71, HAR, for staff time spent in segregating information that is subject to withholding under the UIPA. However, without statutory authorization to do so, DBEDT may

not discriminate between requesters in providing access to public records, nor may DBEDT sell information from public records at market value in place of the fees permitted under the UIPA.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

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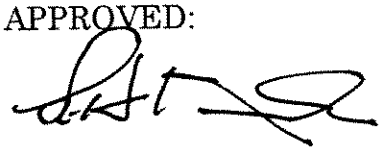

Leslie H. Kondo
Director

JZB:ankd