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September 22, 2004

Ms. Janice S. Kato, MBA
Manager, Federal Programs
Research and Information
High Technology Development Corporation
2800 Woodlawn Drive, Suite 100
Honolulu, Hawaii 96822

Re: Access to Computer Records (RFO 01-003)

Dear Ms. Kato:

You have asked for an opinion from the Office of Information Practices ("OIP") concerning whether the High Technology Development Corporation ("HTDC"), a state agency attached to the Department of Business, Economic Development and Tourism, is required by the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA") to provide upon request its business directory, maintained on and available through HTDC's web site, in a paper format.

ISSUE PRESENTED

Whether, under the UIPA, when a requester seeks access to a publicly available record in paper format and the agency only maintains the record in electronic format, the agency must make the record available in paper format.

BRIEF ANSWER

Yes. When a record can be readily converted from electronic format to paper format without unreasonable interference with the agency's functions

and the information is required to be disclosed under the UIPA, the agency is required to provide the record in paper format.

FACTS

You have advised that HTDC publishes a biennial directory of Hawaii high technology firms, but does not maintain the directory in hard copy or paper format. The directory is maintained only on HTDC's internet web site,[1] and it would take staff approximately one hour to prepare the entire business directory for printing. Occasionally, HTDC receives a request for a printed version of the business directory from a member of the public. To date, such inquiries have been responded to by asking for the requester's area of interest and printing out a partial, abbreviated listing that correlates to that area of interest. You ask whether, were HTDC to receive a request for the entire business directory in paper format, HTDC would be required by the UIPA to provide the directory in the requested format.

DISCUSSION

The legislature has expressly declared that two of the UIPA's purposes are to "promote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records[.]" Haw. Rev. Stat. § 92F-2 (1993). To implement those policies, section 92F-11(a), HRS, provides that "[a]ll government records[2] are open to public inspection unless access is restricted or closed by law[.]" Records that are already in the public domain are required to be made available to the public. See OIP Op. Ltr. No. 02-04 at 9 (June 26, 2002). As the business directory is on a public web site, it is in the public domain and is required to be made publicly available. See also Haw. Rev. Stat. § 92F-12(a)(15) (Supp. 2003).

In the OIP Opinion Letter Number 90-35, we opined that agencies are required to make information available in the form in which it is requested, if the record is maintained in that form (assuming no exception to access applies under section 92F-13, HRS). There, the issue was whether an electronic copy of information required to be disclosed under the UIPA in an

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1 http://www.htdc.org/directory.asp, accessed July 30, 2004.

2 The UIPA's definition of "government record" includes information maintained in electronic form. Haw. Rev. Stat. § 92F-3 (1993). Thus, records maintained electronically by government agencies, including those posted on an agency's website such as the business directory that is the subject of HTDC's inquiry, are subject to the UIPA.

agency's electronic database was required to be made available, in place of a paper copy. Here, the question is whether, for publicly available records maintained by an agency in electronic format and sought in a paper format, an agency must make those records available in paper format.

This precise issue is not directly addressed by the UIPA or by the OIP's administrative rules.[3] All the same, both the statute and the OIP's rules recognize that agencies are required to make reasonable efforts to be of service to record requesters. Agencies are required to "assure reasonable access to facilities for duplicating records and for making memoranda or abstracts." Haw. Rev. Stat. § 92F-11(d) (1993). And, the OIP's rules recognize that agencies are required to make reasonable efforts to accommodate record requesters:

> [w]hen a requester requests that a copy of a record be transmitted by mail, telefax, or other means, the agency shall make a reasonable effort to transmit a copy of the record in the manner sought by the requester; provided that the requester pays all fees assessed under section 2-71-19 and the transmission does not unreasonably interfere with the agency's functions.

Haw. Admin. R. § 2-71-18(c) (1999). In addition, the UIPA provides that, when information is "readily retrievable,"[4] an agency is required to make available a compilation or a summary of its records in response to a request for information.[5] Haw. Rev. Stat. 92F-11(c) (1993).

We believe that, generally speaking, a record maintained electronically is "readily retrievable" and providing a paper copy of an electronic record[6]

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[3] The OIP's rules are located at chapter 2-71, Hawaii Administrative Rules ("HAR").

[4] When the UIPA was enacted, it was based in large part on the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners of Uniform State Laws. H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). The commentary to the Model Code is to be consulted in interpretation of similar UIPA provisions. Id. The commentary to the identical provision in the Model Code (2-102(b)) instructs that "it is most important to agencies with manual record systems. In computerized record systems, however, agency retrieval capabilities are significantly greater." Model Code at 12.

[5] Although the UIPA generally applies to records maintained by government agencies and not to information requests, the OIP interprets the statute to require an agency to provide access to its records that contain the requested information, unless allowed by the statute to withhold the records.

[6] We use the term "electronic record" to relate to records maintained by an agency on its computers or website. We do not imply by this opinion that agencies are required to, for instance,

requires less effort than making a compilation or summary of electronic records. We thus conclude that, given your explanation that setting up the business directory for printing would take approximately one hour, HTDC is required to provide a paper copy of its entire business directory, upon request.[7]

This conclusion is required by the UIPA's broad declaration of policy set forth in section 92F-2, HRS. There, the legislature acknowledged that "[g]overnment agencies exist to aid the people in the formation and conduct of public policy" and specifically declared that the UIPA is to be applied and construed, *inter alia*, "promote the public interest in disclosure," and to "provide for accurate, relevant, timely and complete government records."

We also conclude that the UIPA's requirement that agencies "assure reasonable access to facilities for duplicating records" must be interpreted in light of current data collection and distribution practices, including maintaining of records only on a web site. We believe that agencies are permitted to advise record requesters that information sought by them is available via the internet; nevertheless, agencies cannot advise requesters that they can *only* access records via the internet.[8] Such a requirement would discriminate against those requesters who are unwilling or unable to access the internet. We believe that conditioning access to a record on access to the internet is prohibited by the UIPA's language requiring that agencies make their records available to "any person." Haw. Rev. Stat. § 92F-11 (1993); Haw. Admin. R. §§ 2-71-11(a), -12(a). See also OIP Op. Ltr. No. 01-07 at 4 ("government agencies should not discriminate against certain classes or types of requesters when processing record requests"). In light of the UIPA's requirement that "any person" be granted access to government records (unless authorized to be withheld by law), we must interpret the UIPA as requiring that government agencies make records available in a paper format. In this case, this means that, if, after advising a requester that the information sought is available through the web site, the requester advises

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provide a transcript of an audiotape – such a requirement would be an unreasonable interference with an agency's duties, unless it is the agency's usual practice to transcribe the audiotape. A video document, likewise, does not have to converted to a format other than the format in which it is recorded.

[7] We also opine that an agency is entitled to charge copy fees to make electronic records available in paper format.

[8] We note that not all members of the public have access to the internet and that some members of the public may be unwilling or unable to go to a public library to access the internet.

the agency that he or she wants a paper copy and furnishes prepayment[9] for the paper copy, the agency is required to provide a paper copy.

CONCLUSION

In light of the UIPA's express purposes, one of which is a general policy of access to government records, the UIPA's requirement that agencies prepare a compilation of records that are readily retrievable in the form requested, the requirement that agencies assure reasonable access to facilities to duplicate records, and the UIPA's requirements that it be applied and construed to promote its underlying purposes and policies, the OIP concludes that disclosure of a paper copy of publicly available agency records only maintained in electronic format is required, when requested. Thus, a computer file containing a record required to be disclosed under the UIPA is available to the public in both the electronic or paper version.[10] Such disclosure will promote and protect the public's right to access government records.

Sincerely,

Susan R. Kern
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

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[9] Under the OIP's administrative rules, agencies are authorized to require prepayment of 100% of "lawful fees" before the agency begins the search for and review of records in order to respond to a record request. Haw. Admin. R. §§ 2-71-19(a)(2), (b)(2) (1999). Section 92-21, HRS, requires agencies to furnish copies of those government records that are open to inspection by the public upon payment of the reasonable cost of reproducing the copy. Based on section 92-21, HRS, the OIP considers the cost of copying a government record to be a lawful fee and routinely advises government agencies that they are authorized to require prepayment of copying fees before responding to a record request.

[10] Agencies may, but are not required to, convert publicly available paper records to electronic format, when requested to do so.