October 27, 1992

Honorable Robert A. Marks
Attorney General
Office of the Attorney General
Hale Auhau Building
425 Q425 Queen Street
Honolulu, Hawaii 96813

Attention: Ted Gamble Clause
Deputy Attorney General

Dear Mr. Marks:

Re: Public Access to Settlement Agreement in 1963 Film Exhibition Anti-Trust Case

This is in reply to a memorandum from Deputy Attorney General Ted Gamble Clause, requesting the Office of Information Practices ("OIP") to provide the Department of the Attorney General ("Department") with an advisory opinion concerning whether, under the Uniform Information Practices (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a settlement agreement dated February 24, 1964 between the State of Hawaii and Consolidated Amusement Company, Limited in State of Hawaii v. Forman, Civil No. 12825, must be made available for public inspection and copying upon request.

ISSUE PRESENTED

Whether, under the UIPA, a court approved settlement agreement between the State of Hawaii, acting by its Attorney General, and William Forman, Consolidated Amusement Company, Limited, Royal Theaters, Limited, Mission Amusement Co., Inc., Pacific Drive in Theaters Corp., and Urban Drive In Theaters, Inc. ("Settlement Agreement"), must be made available for public inspection and copying upon request.

BRIEF ANSWER

Except as provided in section 92F-13, Hawaii Revised Statutes, all government records must be made available for public inspection and copying upon request by any person. See Haw. Rev. Stat. . 92F-11(b) (Supp. 1991).

Based upon the authorities set forth in a previous OIP opinion letter, and State court decisions rendered since the date of our previous advisory opinion, we conclude that unless information in a settlement agreement to which the State or a county is a party is protected by one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, it must be made available for public inspection and copying upon request, notwithstanding the fact such settlement agreement contains mutual promises of confidentiality. To the extent that such a promise of confidentiality restricts the disclosure of information that is not protected by one of the UIPA exceptions set forth in section 92F-13, Hawaii Revised Statutes, we believe that such promises would be void as against public policy, and, therefore, be unenforceable.

Based upon our careful examination of the contents of the Settlement Agreement, we conclude that its contents do not fall within one of the UIPA's exceptions to required agency disclosure of government records in section 92F-13, Hawaii Revised Statutes. Therefore, we find that the Department must make the Settlement Agreement available for public inspection and copying upon request.

FACTS

On August 30, 1963, the State of Hawaii ("State") commenced a civil action in the Circuit Court of the First Circuit of the State of Hawaii entitled "State of Hawaii v. William Forman, et al.," bearing the Civil No. 12825. In its complaint, the State alleged that certain agreements and practices among the defendants named in the State's complaint violated the existing State anti-trust law, Act 190, Session Laws of Hawaii 1960, which law is now codified in chapter 480, Hawaii Revised Statutes.

Approximately six months after having filed suit, the State entered into a fifteen page Settlement Agreement dated February 24, 1964 with some of the defendants named in the State's complaint, namely William Forman, Consolidated Amusement Company, Limited, Royal Theaters, Limited, Mission Amusement Co.

Inc., Pacific Drive In Theaters Corp., and Urban Drive In Theaters, Inc. Generally, the 1964 Settlement Agreement provided that the State would not seek relief under the terms of its complaint or require the respondents to defend the lawsuit during an 18 month period within which certain of the defendants were to take and fully perform specific acts described in the Settlement Agreement. The Settlement Agreement also provided that upon full compliance with the terms of the Settlement Agreement, the State would dismiss its complaint in Civil No. 12825 without prejudice.

Concurrent with the execution of the Settlement Agreement, the parties to the Settlement Agreement entered into a Stipulation, a copy of which is attached as Exhibit "A." This Stipulation was approved by the Court.

By a letter dated September 21, 1992 addressed to Attorney General Robert A. Marks, Attorney Diane D. Hastert requested the Department to permit her law firm to inspect and copy the Settlement Agreement, among other records. In her letter to the Attorney General, Ms. Hastert referenced section 92F-11(b), Hawaii Revised Statutes, and noted that she represents an individual "who has taken over the operation of Holiday Theaters, and soon will acquire those theaters from Thomas Hayes, the bankruptcy trustee for Holiday Mart, Inc."

In a memorandum dated October 7, 1992, Deputy Attorney General Ted Gamble Clause requested the OIP to provide the Department with an advisory opinion concerning "whether the attorney general is obligated by HRS . 92F-11 to grant Ms. Hastert's request for records." In the Department's request for an opinion, it notes that it would be reasonable for Consolidated Amusement Company, Limited to conclude that in the 1964 Stipulation approved by the court "the State promised not to make the settlement agreement public except in connection with an action to enforce the settlement agreement."

In connection with the preparation of this opinion, and at the OIP's written request, the Department provided the OIP with a copy of the Settlement Agreement for its review.

DISCUSSION

The UIPA provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1991). Specifically, "[e]xcept as provided in section 92F-13, each agency upon request

by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1991). Since the Settlement Agreement constitutes "[i]nformation maintained by an agency in written . . . form," it is a "government record" subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1991); OIP Op. Ltr. No. 91-5 at 6-7 (Apr. 15, 1991).

In OIP Opinion Letter No. 89-10 (Dec. 12, 1989), we examined whether settlement agreements entered into between the State and several defendants in litigation concerning Aloha Stadium construction defects must be made available for public inspection and copying under the UIPA. We noted that the only UIPA exceptions that would arguably apply to settlements agreements between an agency and third parties would be those set forth by sections 92F-13(1), (2), and (3), Hawaii Revised Statutes.

In OIP Opinion Letter No. 89-10, we also noted that "the courts in construing state public or open records laws, have consistently ordered that a settlement agreement to which an agency was a party be made available for inspection." In footnote 5 of OIP Opinion Letter No. 89-10, we surveyed decisions by courts in a number of other jurisdictions, each holding that settlement agreements must be publicly accessible under the open records laws of other states. As a result, in OIP Opinion Letter No. 89-10, we concluded that upon the final resolution of the State's Aloha Stadium construction defects lawsuit, settlement agreements entered into by the State with the various named defendants must be made available for public inspection and copying. Id. at 8.[1]

Since the date of the issuance of OIP Opinion Letter No. 89-10, additional courts have concluded that settlement agreements between government agencies and third parties must be

[1]The OIP concluded that pending the final resolution of the State's Aloha Stadium construction defect claims against non-settling defendants, under section 92F-13(3), Hawaii Revised Statutes, the State could withhold public access to settlement agreements with certain defendants named in the State's complaint, because, under the circumstances, disclosure of information contained in the agreements "would . . . give a manifestly unfair advantage to any person proposing to enter a contract or agreement with an agency." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

publicly accessible under state public records laws. For example, in Librach v. Cooper, 778 S.W.2d 351 (Mo. Ct. App. 1989), the court held that a Missouri open record and open meetings act provision excluding privileged communications between governmental bodies and its attorneys did not protect a settlement agreement between a board of education and a superintendent of a school district from disclosure, reasoning:

> Plaintiffs are not seeking the "communications" between the Board and its attorney. They do not seek any settlement proposals or negotiations discussed prior to the final Agreement, nor do they seek the records or minutes relating or pertaining to those possible communications and deliberations. Simply stated, the Agreement sought is not a "communication" between the Board and its attorney. It is the final, written contract between the Board and Burns, a third party.

Librach, 778 S.W.2d at 354.

Similarly, in State ex. rel. Kinsley v. Berea Bd. of Educ., 582 N.E.2d 653 (Ohio App. 8 Dist. 1990), the court held that settlement agreements between teachers and a school board were not compiled in anticipation of litigation, and were not protected from public disclosure by exemptions in the Ohio Public Records Act, reasoning:

> A settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit. It simply does not prepare one for trial. A settlement agreement is a contract negotiated with the opposing party to prevent or conclude litigation. Consequently, although the parties and their attorneys subjectively evaluated the litigation confronting them in order to reach a settlement, the settlement agreement itself contains only the result of the negotiation process and not the bargaining discourse which took place between the parties in achieving the settlement. Moreover, under varying circumstances, courts in other states have found no valid reason for secreting documents which designate how tax dollars are spent, either directly or indirectly through insurance premiums, by public bodies to settle disputes.

State ex rel. Kinsley, 582 N.E.2d at 655; see also, In re Des Moines v. Des Moines Register & Tribune Company, 487 N.W.2d 666

(Iowa 1992).

In its memorandum to the OIP requesting an opinion, the Department notes that it believes that the other party to the Settlement Agreement could reasonably infer that the terms of the Settlement Agreement would not be publicly disclosed except in connection with an action to enforce the agreement, and that "frequently, the state must promise confidentiality to obtain agreement on some matter that the State is negotiating."

The Stipulation between the State and Consolidated Amusement Company, Limited provides:

> Plaintiff and said remaining defendants reserve any and all rights each of them may have under the terms of said written agreement executed concurrently herewith, including the right to make said agreement a part of the court record or introduced into evidence in the event either party should attempt to seek performance of the terms of said agreement or should proceed to seek relief under the terms of the complaint as provided thereunder.

Stipulation at 3, State of Hawaii v. Forman, et al., Civil No. 12825 (February 24, 1964).

Even assuming that, by virtue of the above quoted language, the State promised not to publicly disclose the Settlement Agreement, we can ascertain no appropriate reason to depart from the conclusions set forth in OIP Opinion Letter No. 89-10. In that opinion, we concluded that unless information in a settlement agreement is itself protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes, a confidentiality provision or clause in a settlement agreement to which the State or a county is a party must yield to the provisions of the UIPA, because such a clause or provision would be void as against public policy. See OIP Op. Ltr. No. 89-10 at 8 n. 6 (Dec. 12, 189) and cases cited therein; see also, OIP Op. Ltr. No. 90-39 at 10 (Dec. 31, 1990) (confidentiality agreements cannot supersede UIPA disclosure provisions).

Since the date of our 1989 opinion letter, additional courts have found that mutual promises to not disclose the terms of a settlement agreement cannot, by themselves, change the statutory dictates of a state public records law. See Librach, 778 S.W.2d at 353; State ex. rel. Sun Newspapers v. Westlake Bd of

Education, ___ N.E.2d ___, 1991 WL 398847 (Ohio Ct. App. 1991) ("[a] public entity cannot enter into enforceable promises of confidentiality with respect to public records"); The Tribune Company v. Hardee Memorial Hospital, 1991 WL 235921 (Fla. Cir. 1991) ("[a]n agency simply cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements").

We agree with the Department's observation in its memorandum to the OIP that the State must frequently make promises to obtain an agreement on some matter that the State is negotiating. Unlike private litigants, however, one promise the State cannot validly make is a promise of confidentiality, unless the information subject to the promise is, itself, protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes.[2]

Based upon our careful examination of the written Settlement Agreement between the State, Consolidated Amusement Company, Limited, and other defendants in the 1963 film exhibition anti-trust case, in our opinion the information set forth therein does not fall within any of the UIPA's exceptions to required agency disclosure set forth in section 92F-13, Hawaii Revised Statutes. In accordance with section 92F-11(b), Hawaii Revised Statutes, it is our opinion that it must be made available for public inspection and copying upon request by any person.

CONCLUSION

We conclude that under the UIPA, the Settlement Agreement must be made available for public inspection and copying upon

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[2]For example, in the case of Guy Gannett Pub. v. University of Maine, 555 A.2d 470 (Me 1989), the Supreme Judicial Court of Maine held that a sentence in a settlement agreement between the University of Maine and a former basketball coach that contained medical information concerning the basketball coach was excepted from disclosure under a privacy exception in the Maine Freedom of Access Act. However, the court found that after this sentence was excised from the settlement agreement, the remainder of the settlement agreement must be made available for inspection and copying. A copy of the Settlement Agreement in this case was actually made part of the court's published opinion after the protected information had been segregated. See id. at 473.

request. Based upon our review of the contents of the Settlement Agreement, the information set forth therein is not covered by one of the UIPA's exceptions to required agency disclosure of government records. Additionally, even assuming that the court approved Stipulation could reasonably be construed as containing a promise on the part of the State to refrain from publicly disclosing the contents of the Settlement Agreement, for the reasons explained above, we believe that this provision of the Stipulation would be void as against public policy and, therefore, unenforceable.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: Diane D. Hastert, Esquire