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December 20, 1989

Andrew V. Beaman, Esq.
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700 Bishop Street
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Dear Mr. Beaman:

Re: Applicability of UIPA to Aloha Tower Development
Proposals

This is in response to your letter dated October 5, 1989, requesting an advisory opinion regarding the confidentiality of development proposals submitted for the Aloha Tower complex.

ISSUES PRESENTED

I. Whether development proposals submitted to the Aloha Tower Development Corporation ("ATDC") in response to a written Request for Proposals ("RFP") are "government records" as defined in Hawaii's new public records law, the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes.

II. Whether development proposals submitted to the ATDC in response to a written RFP are public or confidential under the UIPA.

III. Whether there are any other laws affecting disclosure of the development proposals that the ATDC should take into consideration.

BRIEF ANSWERS

I. Yes. The development proposals submitted to the ATDC in response to a written RFP are "government records" as defined in the UIPA.

II. Development proposals submitted to the ATDC in response to a written RFP are confidential pursuant to the UIPA if their release would frustrate a legitimate government function as set forth in section 92F-13(3), Hawaii Revised Statutes, by giving a "manifestly unfair advantage" to the other developers proposing to enter into an agreement with the State.

III. Yes. There may be other state and federal laws affecting the disclosure of the development proposals; if such a law exists, it will control disclosure.

FACTS

On May 31, 1989, the ATDC issued a written RFP to the public inviting prospective developers to submit proposals by October 3, 1989, for the development of the Aloha Tower complex. Four developers submitted proposals, which included the following information: (1) developer's qualifications, (2) developer's financial condition, (3) design proposal, (4) traffic study, (5) financial pro forma, (6) development schedule, (7) construction cost estimate, (8) operating income/expense projections, and (9) financing plan.

The ATDC administrative rules allow up to six months after the ATDC's initial selection of a developer for negotiations between the ATDC and the developer, culminating in the execution of a lease and development agreement. The rules also provide that the proposals submitted by the developers shall remain confidential until after a lease and development agreement are executed.

A newspaper reporter has requested access to the development proposals, at least those portions that would not be exempt from public disclosure as "trade secrets" or "confidential commercial or business information." See OIP Op. Ltr. No. 89-5, November 20, 1989. The reporter also has questioned whether the ATDC administrative rules can keep all of the information submitted by the developers confidential until negotiations are completed, and a lease and development agreement are executed. You have requested an advisory opinion on behalf of your client, the ATDC.

DISCUSSION

I. Development Proposals Are Government Records.

The first issue raised is whether the development proposals submitted to ATDC in response to an RFP are "government records" under the UIPA.

The UIPA defines "[g]overnment record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989). Although the UIPA contains no definition of "maintained," the principles of statutory construction contained in chapter 1, Hawaii Revised Statutes, advise us that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1985) (emphasis added). "Maintained" is defined as "kept possession and care of,"¹ which the ATDC has done with the proposals since receiving them from the developers.

The ATDC was created as a "public body . . . , public instrumentality, and agency of the State,"² thereby making it an "agency" within the UIPA's definition. Haw. Rev. Stat. § 92F-3 (Supp. 1989). We therefore must conclude that the development proposals submitted to the ATDC for the Aloha Tower complex are "government records" as defined in the UIPA.

II. Status of Development Proposals.

The second issue raised is whether the development proposals submitted to the ATDC in response to a written RFP are public or confidential under the UIPA.

The UIPA states 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. 1989) (emphasis added). Section 92F-13(3), Hawaii Revised Statutes, provides

¹ Black's Law Dictionary 859 (5th ed. 1979).

² Haw. Rev. Stat. § 206J-1 (Supp. 1989).

that disclosure is not required if the records in question "must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989).

Senate Standing Committee Report No. 2580, dated March 31, 1988, illustrated the concept of "frustration" through a non-exhaustive list of examples, including the following:

- (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;

This example and the word "frustration" itself were based on section 2-103 of the Uniform Information Practices Code ("Model Code"), drafted in 1980 by the National Conference of Commissioners on Uniform State Laws:

§ 2-103 Information not Subject to Duty of Disclosure.

- (a) This Article does not require disclosure of:

. . . .

- (5) information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency; [Emphasis added]

House Standing Committee Report No. 342-88, dated February 19, 1988, expressed the Legislature's intent that "the commentary to the Model Uniform Information Practices Code . . . guide the interpretation of similar provisions found in the UIPA created by this bill where appropriate." Section 2-103(a)(5) of the Model Code was intended to protect "the integrity of the procurement and competitive bidding process Once a contract is let or a purchase is made, the exemption generally will no longer apply." Model Code § 2-103 commentary at 17 (1980).

The ATDC's position is that the release of any of the development proposals before the ATDC has successfully completed its negotiations with one developer, and also executed a lease and development agreement with that developer, could seriously frustrate the ATDC's selection process. This could occur especially if the negotiation process with the first chosen developer breaks down and the ATDC begins new negotiations with a second developer. The second developer would have a manifestly unfair advantage over the first if it had knowledge of the details of the first (and unsuccessful) developer's proposal.

Because of the long, multi-step selection process contained in the ATDC's administrative rules, the final decision is not actually made until negotiations are concluded and the lease and development agreement have been executed. Once that has occurred, the ATDC should disclose the contents of the proposals to the general public and the unsuccessful bidders after any information otherwise exempt from disclosure under the UIPA is deleted, such as confidential commercial or financial information.

We note that if a developer who has submitted a proposal to the ATDC chooses to release some or all of its proposal to the public, it is most certainly free to do so. However, the developer will be deemed to have waived any right to confidentiality for that portion of the proposal that it released.

III. Other State and Federal Laws Affecting Disclosure.

The third issue raised is whether there are any other laws affecting disclosure of the development proposals that the ATDC should take into consideration.

Section 92F-12(b)(2), Hawaii Revised Statutes, requires agencies to disclose "[g]overnment records which, pursuant to a federal law or a statute of this state, are expressly authorized to be disclosed to the individual requesting access." Conversely, section 92F-13(4), Hawaii Revised Statutes, states that the UIPA does not require disclosure of "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure."

We thus advise you to consider whether a state or federal law exists which would specifically mandate or prohibit disclosure, e.g., federal funding and/or contracting

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requirements. If such a law does exist, it will control the issue of disclosure. We could find no other state law controlling the issue presented and decline to venture whether there are any applicable federal laws.

CONCLUSION

The development proposals submitted to the ATDC are being maintained by a state agency, and thus they are government records as defined by the UIPA.

The development proposals may remain confidential under the "frustration exemption" in section 92F-13(3), Hawaii Revised Statutes, until the ATDC has completed its selection procedure and made a final choice of a developer for the Aloha Tower complex. The selection procedure is completed as defined by the ATDC administrative rules after the ATDC has concluded negotiations and executed a lease and development agreement with a developer. Until such negotiations are concluded, and the agreements are executed, the selection procedure is not complete and release of any proposal information could give an unfair advantage to the other developers who also submitted proposals. Once the disclosure of the proposals no longer frustrates a legitimate government function, they may be disclosed after the deletion of confidential commercial or financial information. However, a developer may release part or all of a proposal on its own initiative, thus waiving any right to confidentiality for the portion released.

There may be other state or federal laws affecting disclosure. The UIPA states that other such state or federal laws, if they exist, control disclosure.


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APPROVED:


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