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April 12, 2001

The Honorable Rene Mansho
Council Member, District 1
City Council
City and County of Honolulu
Honolulu Hale
530 South King Street
Honolulu, Hawaii 96813-3065

Re: Real Property Tax Information

Dear Council Member Mansho:

In a letter dated July 12, 2000, you asked the Office of Information Practices ("OIP") for comment on a proposed bill to amend an ordinance dealing with public disclosure of tax assessment records.

ISSUE PRESENTED

Whether the information identified in a proposed bill to amend an ordinance dealing with public disclosure of tax assessment records can be kept confidential under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). The information, which is received by the Real Property Tax Division of the City and County of Honolulu, includes lease agreements not involving the use of government land, income statements, and income and general excise tax statements.

BRIEF ANSWER

Ordinances that make records confidential are not recognized under the legislative policy established by the UIPA. Records that fall within the categories of public records set forth in section 92F-12, Hawaii Revised Statutes, must be disclosed without exception. Records that are not within the categories subject to mandatory public disclosure are presumed to be public, but may be shown to fall within an exception to public disclosure under section 92F-13, Hawaii Revised Statutes. Should an agency believe that a record not subject to mandatory disclosure falls within an exception to disclosure, the agency has the legal responsibility to justify non-disclosure of those records.

DISCUSSION

I. THE PROPOSED ORDINANCE AND THE UIPA

The proposed bill attempts to make certain information confidential by creating exceptions to section 8-1.14, Revised Ordinances of Honolulu, 1990. However, this ordinance is only effective to the extent that it is consistent with the UIPA. Thus, the proposed bill would likewise be effective only to the extent that it was consistent with the UIPA.

In OIP Opinion Letter Number 96-2 (July 6, 1996), the OIP opined as to whether the City and County of Honolulu could implement a charter or ordinance provision requiring the public disclosure of certain information in opinions issued by the Ethics Commission of the City and County of Honolulu, in contrast to what the UIPA required. The OIP noted that the legislature intended the UIPA to have uniform interpretation throughout the State and counties. The OIP stated:

> State laws have statewide application and are adopted by the State Legislature. In contrast, county charter and ordinance provisions do not have statewide application.

> Additionally, the UIPA was intended by the Legislature to establish uniform information practices throughout the State and the counties. See, e.g., S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817 (1988) ("the current confusion and conflict which surround existing records laws are plainly unacceptable"). Permitting county governments to create exemptions through the enactment of county charter or ordinance provisions would: (1) permit county governments to avoid the UIPA's freedom of information provisions, and (2) create a substantial possibility that the access policies of the various counties would become a patch-work quilt of conflicting provisions such that the same government records might be accessible in one county and inaccessible in another.
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> [Recognizing] individual county charter or ordinance provisions would be contrary to the legislative intent underlying the UIPA to create uniform information practices. See also OIP Op. Ltr. No. 93-6 (June 22, 1993); OIP Op. Ltr. No. 95-14 (May 8, 1995) (charter provision is not State law for purposes of UIPA exception for records protected from disclosure pursuant to State or federal law)."

OIP Op. Ltr. No. 96-2 at 8 (July 6, 1996). Thus, generally speaking, a record that is public under the UIPA but made confidential by ordinance would remain public. See OIP Op. Ltr. No. 95-14 (May 8, 1995) (UIPA public records cannot be made confidential by charter). Similarly, a record that is confidential by State or federal law cannot be made public by ordinance. OIP Op. Ltr. No. 96-2 (July 6, 1996).

II. MANDATORY DISCLOSURE AND PERMITTED EXCEPTIONS FROM DISCLOSURE UNDER THE UIPA

Section 92F-12, Hawaii Revised Statutes, sets forth "a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed." OIP Op. Ltr. No. 96-2 (July 6, 1996). To the extent that the information listed in the proposed ordinance is "real property tax information" as listed in section 92F-12 (5), Hawaii Revised Statutes, the information must be disclosed to the public as required by section 92F-12, Hawaii Revised Statutes. Moreover, none of the exceptions to disclosure in section 92F-13, Hawaii Revised Statutes, permit withholding records of a type listed in section 92F-12, Hawaii Revised Statutes. The legislature has mandated that these items be public record and that "the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

To the extent that the information listed in the ordinance is not of a type listed in section 92F-12(5), Hawaii Revised Statutes, the exceptions to disclosure in section 92F-13, Hawaii Revised Statutes, may apply. Your letter of July 12, 2000, indicates that you believe the information that the proposed ordinance would seek to keep confidential falls within the exception to disclosure found at section 92F-13(3), Hawaii Revised Statutes.

A. Frustration of a Legitimate Government Function

Section 92F-13(3), Hawaii Revised Statutes, permits government records to be withheld from public disclosure when necessary to avoid the frustration of a legitimate government function. The information covered by the proposed ordinance -- lease agreements for non-government land, income statements, and income and general excise tax statements -- might fall within this exception as it applies to confidential commercial or financial information. Confidential commercial or financial information falls within the exception when the information is both "confidential" and "commercial or financial" and its disclosure would frustrate a legitimate government

function. However, a record does not automatically fall within the exception whenever a government agency or private party asserts that the record is confidential commercial or financial information, disclosure of which would frustrate a legitimate government function. Rather, the agency or other person seeking to keep the record confidential must provide facts to establish that the record meets the definitions of "confidential" and "commercial or financial," and that the record's disclosure would in fact frustrate a legitimate government function.

Information is "commercial" when "the party submitting the information has a commercial interest in it, or if the record pertains or relates to, or deals with commerce." OIP Op. Ltr. No. 97-9 at 8 (December 17, 1997). Information is "confidential" when its "disclosure 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." OIP Op. Ltr. No. 98-2 at 10 (April 24, 1998). A person submitting information suffers substantial competitive harm when "(1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm." Id. at 12.

A determination of whether information qualifies as "confidential commercial or financial information" under these tests is fact-intensive, and the conclusion varies from one factual situation to another. See, e.g., OIP Op. Ltr. No. 98-2 at 10-17 (April 24, 1988) (amounts used by private health care benefits companies to reimburse Kona Community Hospital for medical services provided to enrollees were not "confidential" for the purpose of the exception); OIP Op. Ltr. No. 97-9 (privately compiled database of the location and status of endangered species and ecosystems was "confidential commercial or financial information" for the purpose of the exception); OIP Op. Ltr. No. 92-9 (July 17, 1992) (commercial information on demurrage fee report forms and invoices was not "confidential commercial or financial information" for the purpose of the exception); OIP Op. Ltr. No. 92-7 (June 29, 1992) (list of self-insured employers was not "commercial or financial information" for the purpose of the UIPA's "frustration of a legitimate government function" exception).

Determination of whether disclosure of information would result in the frustration of a legitimate government function involves a similarly factual inquiry. See, e.g., OIP Op. Ltr. No. 98-2 at 9-10 (April 24, 1988) (when agency itself did not argue that disclosure would frustrate its legitimate government functions no frustration was found); OIP Op. Ltr. No. 94-18 (Sept. 20, 1994) (because the Convention Center Authority was negotiating numerous design changes to the selected developer's proposal, disclosure of the evaluation scores could result in the frustration of a legitimate government function by giving the selected developer a manifestly unfair advantage in negotiations, or raise the cost of government procurements.).

B. Application of the Frustration Exception to Ordinances

For government records to be withheld from public disclosure as confidential commercial or financial information, the agency who received the records, and perhaps the person who submitted them, typically must show that the records meet all requirements for the frustration exception as applied to confidential commercial or financial information. The factual situation will vary depending upon the records, their uses and value, and the government function at issue, and the records' eligibility to be withheld will vary with the factual situation. A conclusory statement by the agency is not a substitute for specific facts pertaining to the records at issue. Similarly, an ordinance, in and of itself, could not provide the basis necessary for records to meet the requirements of the "frustration" test.

CONCLUSION

Real property tax information is a type of public records that must be disclosed without exception under section 92F-12(5), Hawaii Revised Statutes. Records of a type not listed for mandatory public disclosure under section 92F-12(5), Hawaii Revised Statutes, are presumed to be public but may be shown to fall within an exception to public disclosure under section 92F-13, Hawaii Revised Statutes. For these records, an agency that believes a record should not be disclosed must establish that the record factually and legally falls within an exception to disclosure found in section 92F-13, Hawaii Revised Statutes. To withhold records based on section 92F-13(3), Hawaii

Revised Statutes, the Real Property Tax Division must show that specific records are confidential commercial or financial information, disclosure of which would frustrate that agency's legitimate government functions. An ordinance by itself is insufficient to satisfy the requirements of this test.

If you have any further questions, please do not hesitate to contact the OIP.

Very truly yours,

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

MTDG/JZB: ran

cc: The Honorable Duke Bainum, Council Member, District IV