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LESLIE H. KONDO
DIRECTOR

May 23, 2005

Ms. Eileen Harada
Department of Business and Economic Development
P.O. Box 2359
Honolulu, Hawaii 96804

Re: Information from Survey Responses RFO-G (05-027))

Dear Ms. Harada:

You asked the Office of Information Practices ("OIP") whether the Department of Business, Economic Development and Tourism ("DBEDT") can offer artists or art companies assurances that their responses to a DBEDT survey will be confidential and not subject to disclosure under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA").

ISSUE PRESENTED

Under the UIPA, must an agency disclose commercial or financial information that is submitted by businesses in response to an agency survey?

BRIEF ANSWER

No. An agency may withhold commercial or financial information that is voluntarily submitted to it, to the extent that the submitters themselves do not customarily release the information to the public, because release of such information would impair the agency's ability to get such information in the future and thus frustrate a legitimate function of the agency. See Haw. Rev. Stat. 92F-13(3) (1993).

FACTS

The survey seeks information from artists about topics that may be commercially sensitive, including (1) the factors most important to their businesses,

(2) the marketing and promotion methods they use, (3) the transportation methods they use to get products and services to market and the destinations, (4) annual sales, (5) percentage of annual sales to county, mainland, and foreign destinations, (6) number of employees, (7) direct sales broken down by buyer category, (8) company name and contact information, and (9) other marketing information the respondent wishes to provide. The artists participating in the survey will be included in a database DBEDT intends to create with the responses. DBEDT believes that without assurances of confidentiality, some respondents may be unwilling to participate in the survey.

DISCUSSION

Section 92F-13(3), HRS, allows an agency to withhold a record in response to a request made under the UIPA when disclosure of the record would result in the frustration of a legitimate government function. Here, DBEDT's argument is that its legitimate function of collecting the survey data would be frustrated if the data could not be kept confidential, because artists would decline to participate in the survey.

An agency may withhold confidential commercial or financial information[1] based on the frustration exception. Commercial or financial information may be withheld as confidential when its disclosure would impair the agency's ability to obtain similar information in the future.[2] OIP Op. Ltr. No. 02-07 at 11-12. To determine whether disclosure would impair the agency's ability to obtain similar information in the future, OIP first looks to whether the person submitting the information did so voluntarily. When information is required to be disclosed by law, or to obtain a benefit (such as a contract or a permit), there is a rebuttable presumption that its disclosure will not impair the agency's ability to obtain similar information in the future. Id. at 12-13; see also OIP Op. Ltr. No. 94-14 at 6 (disclosure of information required for permit will not impair government's future ability to obtain such information); OIP Op. Ltr. No. 91-16 at 11 (disclosure of information required as part of contract negotiations will not prevent other companies from competing for government contracts).

OIP did not address voluntary submittals in its Opinion Letter Number 02-07, as that opinion dealt with a disclosure required by law. However, Critical Mass Energy Project v. Nuclear Regulatory Commission, a federal Freedom of

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[1] See OIP Op. Ltr. No. 97-9 at 8-9 for a discussion of what constitutes commercial information. OIP concludes that the information sought by the proposed survey is commercial or financial in nature.

[2] An agency may also withhold such information if its disclosure would substantially harm the competitive position of the person who provided the information. E.g. OIP Op. Ltr. No. 98-2.

Information Act case[3] that OIP relied on in its Opinion Letter Number 02-07, also set forth the standard for determining whether the release of information submitted voluntarily would impair an agency's ability to obtain such information in the future.

> Where . . . the information is provided to the Government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.

Critical Mass, 975 F.2d 871, 878 (1992). Critical Mass also noted that the presumption only applies to information that is not otherwise public:

> [F]inancial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of [the FOIA exception] if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

Id. at 879. OIP concludes that under the UIPA's frustration exception, likewise, there is a presumption that the release of financial or commercial information voluntarily provided to an agency would impair the agency's ability to obtain such information in the future. The information may be withheld if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

Here, the survey participants are not required by law or rule to provide DBEDT with the survey information. The only benefit conditioned on providing information is being part of database of survey results, which may enable DBEDT to better assist participating companies. This indirect benefit is not comparable to a requirement that information be provided to obtain a government contract, to lease government property, or to obtain other more tangible benefits. OIP therefore concludes that the survey information will be submitted voluntarily. Thus, there is a presumption that the agency's legitimate function of collecting such information would be frustrated if the survey responses were disclosed, because the survey participants would decline to provide the requested information.

OIP notes, however, that some of the information sought by the survey may be either public already, or of a kind that would customarily be released to the public. For instance, the number of employees may already be public for some companies, or may be information that the companies customarily release upon

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[3] "[A]lthough the federal Freedom of Information Act ("FOIA") is different regarding disclosure of confidential business information, the OIP has adopted parts of the federal test." OIP Op. Ltr. No. 02-07 at 8.

request. Similarly, in most cases the company contact person, business address, phone and fax numbers, web address, e-mail address, and year established, will already be public. To qualify for the frustration exception, voluntarily submitted information must be of a kind that would customarily not be released to the public by the person from whom it was obtained.

To summarize, DBEDT may withhold responses to the proposed voluntary survey under the UIPA's frustration exception, but only to the extent that the information submitted is of a kind that would customarily not be released to the public by the person from whom it was obtained. DBEDT may not use the frustration exception as a basis for withholding information that the respondents customarily release to the public.

Because DBEDT's ability to withhold information may vary depending on who submitted it (for instance, if one company routinely publishes the number of employees it has but another company considers that information confidential), DBEDT may wish to include general language on the survey document indicating that it will keep the information collected confidential to the extent permitted by law.

OIP will close this file with this opinion letter. If you have further questions about this issue or the UIPA in general, please do not hesitate to call OIP.

Very truly yours,

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

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