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The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA) pursuant to section 92F-42, HRS.

Requester: Alfred B. Castillo, Jr., County Attorney
Agency: County of Kauai
Date: July 28, 2010
Subject: Settlement Proceeds Paid by County's Private Insurers (U RFO-G 10-4)

REQUEST FOR OPINION

Requester seeks an advisory opinion on whether the County of Kauai could, under the UIPA, keep confidential the amounts paid under its private liability insurance policies to settle claims against the County related to the Ka Loko Dam breach on March 14, 2006 (the Insurance Proceeds).

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's letters dated August 5 and September 15, 2009.

QUESTION PRESENTED

Whether the UIPA requires the County to disclose the amount of the Insurance Proceeds.

BRIEF ANSWER

Yes. No UIPA exception allows the County to withhold the Insurance Proceeds from public disclosure. The County's total settlement amount reflects the expenditure of public funds, either directly from County coffers or indirectly through the payment of insurance premiums.

FACTS

All of the parties to the multiple lawsuits filed relating to the Ka Loko Dam breach have agreed to a settlement of all claims and have entered into a Ka Loko Litigation Global Settlement Agreement (the Settlement Agreement). The Settlement Agreement includes a provision for confidentiality of the amounts to be paid by all defendants.[1]

The County's settlement amounts were paid with (1) public funds covering the deductible amounts in the County's private liability insurance policies, and (2) the Insurance Proceeds. The County understands that it must publicly disclose the settlement amounts that will be directly paid with public funds. However, the County asked for this opinion because its private insurers had requested that the County keep the amount funded by the Insurance Proceeds confidential.[2]

DISCUSSION

I. Settlement Agreement Confidentiality Clause

The Insurance Proceeds may not be kept confidential based upon the Settlement Agreement's confidentiality clause. Settlement agreements between government agencies and third parties are public documents, except to the extent that information contained in the agreement may be withheld under an applicable exception to disclosure under the UIPA. OIP Op. Ltr. No. 89-10; see, e.g., OIP Op. Ltr. No. 02-01. A confidentiality provision in an agreement to which a state or county agency is a party must yield to the provisions of the UIPA. Id. (citing State of Hawaii Org. of Police Officers v. Soc'y of Prof'l Journalists, 83 Haw. 378, 406 (1996) (a confidentiality agreement that prevents a government agency from performing its duties under the UIPA is unenforceable)). Therefore, the County

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[1] Upon motion by the County, the Settlement Agreement and the Appendix setting forth the County's settlement amounts (Appendix) were sealed by the court on August 5, 2009. Order Granting Defendant County of Kauai's *Ex Parte* Motion to Seal Exhibits "A" and "B" to the County's Motion for Determination of Good Faith Settlement, Civil No. 06-1-0082 (Haw. 5th Cir. August 5, 2009). In January 2010, the Court granted the County's petition to unseal the Settlement Agreement and the Appendix as it related to the County. The County has asked OIP to render this opinion notwithstanding the court order unsealing its portion of the Settlement Agreement and Appendix.

[2] Among other reasons, the County stated that the carriers wish to have the amounts paid as Insurance Proceeds kept confidential to protect their privacy interests. However, only natural persons have cognizable privacy interests under the UIPA's privacy exception. Haw. Rev. Stat. §§ 92F-3 and -13(1); see OIP Op. Ltr. Nos. 89-5; 99-3 at 8 n.3. Thus, withholding to protect the privacy of the insurers would not be proper under the privacy exception.

may not withhold the Insurance Proceeds from public disclosure based upon the Settlement Agreement's confidentiality clause.

II. Insurance Proceeds Are Public Moneys

The County offers that the Insurance Proceeds may be withheld based upon a distinction between "the public's share of the County's settlement" paid with "public funds," i.e. the deductible portion paid directly out of the public coffers, and the "*private* insurance proceeds" paid with "*private moneys*" by the insurers on behalf of the County as the insured beneficiary (italics in original, underscoring added). However, the County has provided no legal authority supporting this distinction.

Case law reviewed by OIP weighs against any such distinction. In addition to the many courts that have ruled that settlement agreements involving government entities must be public, courts in other jurisdictions have in various contexts more specifically rejected arguments that the introduction of an insurance carrier of a government entity has an effect on the disclosure of a settlement. These courts have found that settlement agreements and amounts must be public because they represent the payment of tax dollars whether funded directly or indirectly through the payment of insurance premiums, and whether paid directly to third parties or through the insurance carrier. See Central Kentucky News-Journal v. George, 306 S.W.3d 41, 46 (Ky. 2010) (finding settlement agreement subject to disclosure where "settlement proceeds were paid out of the Kentucky School Board Insurance Trust, an insurance policy, the premiums for which had to have been, at least indirectly, paid with public tax money"); Daily Gazette Co. v. Withrow, 177 W. Va. 110, 115-116 (W. Va. 1986) (finding settlement agreement to be a public record because of identified public interest in knowing "financial impact upon the public of a litigation settlement which is paid either with public funds or with insurance proceeds generated by publicly financed insurance premiums (which premiums are adjusted based upon claims experience)");[3] State ex. rel. Kinsley v. Berea Bd. of Educ., 582 N.E.2d 653, 655 (Ohio App. 8th 1990) (court found settlement agreement could not be withheld from public disclosure under public records statute's exception for litigation records, adding moreover that 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

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[3] This court further emphasized the public's right to know where official misconduct is tacitly admitted, especially where the "issues created a substantial monetary liability for the City and influenced its insurance rates for the future, which costs must be borne by the taxpayers." Id.; see also Central Kentucky News-Journal v. George, 306 S.W.3d at 47 (court stated that "[w]hile Appellees' claim that all that remains to be disclosed is the amount of consideration paid to [employee who had brought suit against the Board of Education] as though this were an illegitimate curiosity, we see it as bearing a direct nexus to exactly how the public agency uses the public's money – whether as settlement amounts or in regard to liability insurance premiums").

settle disputes.");[4] see also Copley Press, Inc. v. The Superior Court of San Diego County, 74 Cal. Rptr. 2d 69 (Cal. App. Ct. 1998) (in ruling that amount paid by carrier to settle suit against government is public, court stated that interposition of government entity's excess carrier does not make a claim private); The Morning Call, Inc. v. Lower Saucon Township, 627 A.2d 297, 300-01 (Pa. Commw. Ct. 1993) (court found settlement agreement public because it obligated the Township to disburse public funds to pay the deductible and stated that "[p]aying the money to the insurance carrier and not directly to Werner does not change the fact that it was used to satisfy the Township obligation, and, `laundering´ it through the insurance carrier does not somehow change the character of those funds from public to private").[5]

Because OIP agrees that the interposition of an agency's private insurer does not provide a valid basis for withholding information concerning the settlement of a government liability, OIP believes that a settlement amount is public whether paid directly with funds from the government's coffers or indirectly through insurance premiums. The public has a clear interest in knowing how government uses the public's money for settlements as well as in knowing the attendant impact of such settlements upon future premiums. Accordingly, the Insurance Proceeds, which represent the payment of County tax dollars directly and indirectly towards the Ka Loko settlement, must be disclosed.

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[4] This court rejected the argument that the "litigation" exception in its public records law allowed withholding of settlement agreements, finding that they are not records compiled in anticipation of or in defense of a lawsuit, but rather that conclude litigation. OIP agrees.

The County here asserted that section 92F-13(2), HRS, which similarly allows withholding of nondiscoverable records related to the prosecution or defense of an action to which the government agency is or may be a party, justifies withholding of the Settlement Agreement solely because the parties' agreement to confidentiality makes it "nondiscoverable." OIP has, however, previously opined that the phrase "records would not be discoverable" in section 92F-13(2) refers to those records that fall within judicially recognized privileges, such as the attorney-client or work product privileges. See OIP Op. Ltr. Nos. 89-10, 92-21 and 02-01. The County has not raised facts that would justify nondisclosure under this exception. See OIP Op. Ltr. No. 02-01 at 14-5, 20.

[5] This court also found the settlement agreement to be a public record subject to inspection and copying because of the Township's obligation under the Settlement Agreement for the full amount of the settlement if the insurance carrier failed to satisfy the claim: "Here, the Township signed the Settlement Agreement, making it obligated to pay the entire settlement if its insurance carrier failed to do so. For that reason alone, the document is a public record." Id. at 300. OIP has not reviewed the Settlement Agreement here, so does not rely on an assumption that it contains this standard provision. However, OIP notes that the Settlement Agreement likely contains such a provision and that a County guarantee of payment of its portion of the settlement amount would, as the Pennsylvania court found, be sufficient by itself to make the payment amount public.

III. Frustration of a Legitimate Government Function

The County also contends that disclosure of the Insurance Proceeds may frustrate its ability to (1) reach settlements of claims in a cost-effective manner, and (2) protect public assets by procuring liability insurance coverage at favorable rates.

A. Settlement of Claims

The County asserts that disclosure of the Settlement Amounts will compromise its ability and willingness to settle lawsuits because other claimants could use the information to demand larger settlements than may be warranted, thereby frustrating the County's ability and responsibility to resolve claims on a case-by-case basis and in a cost-effective manner. The County further asserts that disclosure will make their private insurers more prone to avoid settlements and to withhold settlement authority.

OIP has opined that an agency may withhold the terms of an agency's settlement agreement under the "frustration" exception, **but** only while the agency is engaged in ongoing settlement negotiations with similarly situated defendants. OIP Op. Ltr. No. 89-10. The "frustration" ends, and the exception ceases to apply, once a settlement is final. Id. at 7-8. Thus, OIP has recognized application of the "frustration" exception in disclosing terms of a settlement agreement to be temporal in nature and confined to the period prior to final settlement of all related claims. Because OIP understands the Settlement Agreement to be a global settlement of all lawsuits relating to the Ka Loko Dam breach, the County will not be engaged in any additional settlement negotiations that would be "frustrated" by public disclosure of the Insurance Proceeds.

The County asks OIP to extend application of the "frustration" exception to allow withholding of the settlement amounts after execution of a final settlement, based upon its contention that disclosure will hamper future resolution of lawsuits. OIP has previously found, however, that application of the UIPA's exceptions must be narrowly construed and should not rest upon tenuous, conclusory, or speculative arguments. OIP Op. Ltr. No. 93-05. The County has not presented factual evidence to establish its claims of frustration.

Nevertheless, even acknowledging the possibility that disclosure of settlement amounts might affect resolution of future disputes, OIP believes, consistent with courts in other jurisdictions, that on balance "this risk must yield to the public's right to know" protected by our public records statute. Tribune-Review Publ'g Co. v. Westmoreland County Hous. Auth., 574 Pa. 661, 673 (Pa. 2003). The court in Westmoreland County noted that its many sister states had refused to enforce confidentiality provisions in litigation settlement agreements where it was contrary to a freedom of information statute, and added that: "[a]lthough these courts essentially acknowledged the possibility that disclosure might chill future

attempts to resolve disputes, they generally concluded that this risk must yield to the public's right to know." Id.; see Des Moines Indep. Cmty. School Dist. Public Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 669 (Iowa 1992).

B. Procurement of Liability Insurance

The County also argues that mandatory public disclosure of settlement amounts paid by insurers may compromise its ability to procure liability insurance coverage at favorable rates. The County states that disclosure might lead to a lower rating for the County's insurability, larger self-insured retentions, or the inclusion of defense costs in the limits of liability, and will thus frustrate its function of protecting public assets. In support, the County notes legislative history that reflects the intent that the UIPA's "frustration" exception apply to government records where disclosure would (a) raise the cost of government procurement or (b) give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, or both. S. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (listing categories of government records as examples of records that may fall within the "frustration" exception). In addition, the County cites to Ka`apu v. Aloha Tower Dev. Corp., 74 Haw. 365, 389 (1993).

The "frustration" exception is regularly applied in the procurement process, as it was in Ka`apu, to allow withholding of information prior to execution of a final agreement. See Ka`apu, 74 Haw. at 384 ("frustration" exception applies where public disclosure of development proposals prior to final negotiation of a long-term lease could foreseeably give an unfair competitive advantage to other developers in the event negotiations were to break down); OIP Op. Ltr. Nos. 89-15, 94-26 (section 92F-12(a)(3), HRS, mandating disclosure of government purchasing information, allows withholding under § 92F-13 to prevent premature release of information to protect the integrity and purpose of a competitive bid process); OIP Op. Ltr. No. 94-18 at 14-15 (commentary to section 2-103(a)(5) of the Uniform Information Practices Act, from which frustration examples in legislative history to section 92F-13(3) were taken, reflects that protection under that section is generally intended to be temporal in nature).

To extend use of the "frustration" exception to allow withholding of information, including the amount of a contract, after final execution of an agreement would contradict the legislative intent and the policy underlying the UIPA to ensure the public's right to know how public funds are spent. OIP Op. Ltr. No. 94-26; Haw. Rev. Stat. §§ 92F-2, -12(a)(3), (a)(5), (a)(8), (a)(9), (a)(10), (a)(14); OIP Op. Ltr. No. 94-18 at 15 & n.7 ("The UIPA's pre-enactment history and section 92F-12(a)(3), Hawaii Revised Statutes, make clear that the disclosure policies underlying the UIPA are at their apex when the disclosure of government purchasing information, or information about the expenditure of public monies is involved"). Thus, even acknowledging the possibility that disclosure of the settlement amount could result in higher insurance costs to the County, OIP again,

on balance, cannot find that this justifies denying the public information it has a right to know. Id.; see section III.A. above.

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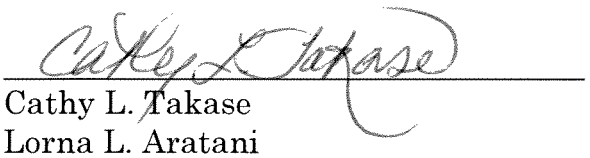

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