**Op. Ltr. 89-05 Applicability of Uniform Information Practices Act (Modified) to State Financial Assistance Programs**

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

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November 20, 1989

MEMORANDUM

TO: The Honorable Roger A. Ulveling, Director
Department of Business and Economic Development

ATTN: Doreen Shishido
Financial Assistance Branch Chief
Department of Business and Economic Development

FROM: Martha L. Young, Staff Attorney
Office of Information Practices

SUBJECT: Applicability of Uniform Information Practices Act (Modified) to State Financial Assistance Programs Records

This is in response to your memorandum dated April 21, 1989 requesting an advisory opinion regarding the effect of Hawaii's new public records law, Hawaii Revised Statutes ("Haw. Rev. Stat.") Chapter 92F, "Uniform Information Practices Act (Modified)" (Supp. 1988) ("UIPA") on the different types of records maintained by the Department of Business and Economic Development ("DBED"), Financial Assistance Branch, in administering state loan programs.

## ISSUES PRESENTED

I. Whether DBED Financial Assistance Branch state loan program records regarding the names of the borrowers, principals and guarantors, and their addresses and occupations are public under the UIPA.

II. Whether details regarding DBED Financial Assistance

Branch state loans such as the amount, purpose and status of the loans with regard to repayment and collection efforts (including date last paid, next due date, age of delinquency if any, number of payments made and number of late payments) are public under the UIPA.

III. Whether DBED Financial Assistance Branch state loan program records such as loan applications, financial and credit information on applicants/principals/guarantors, intra-agency communications as part of loan "presentations", participation details, terms and conditions, guarantees and security are public under the UIPA.

IV. Whether the fact that a loan application has been denied, cancelled, withdrawn or is in process may be disclosed under the UIPA.

V. Whether DBED Financial Assistance Branch statistical summaries or information regarding an applicant's bankruptcy status are public under the UIPA.

VI. Various miscellaneous questions regarding the duration of records retention, the purpose of the record request and whether the request and response must be in writing.

## BRIEF ANSWER

Some of the state loan programs records maintained by the DBED Financial Assistance Branch are public and some are confidential. Although the UIPA's primary mandate calls for government records to be open to the public, individual financial information, the disclosure of which would constitute a clearly unwarranted invasion of privacy, and confidential commercial and financial information, the disclosure of which would result in the frustration of a legitimate government function, are protected from public disclosure.

## FACTS

The DBED Financial Assistance Branch oversees and administers several state loan programs, mainly for small local businesses who are unable to obtain conventional financing for initial formation or later expansion. These loan programs include the Hawaii Capital Loan Program (many of these loans are in participation with commercial banks and the federal

government), the Large & Small Fishing Vessel Loan Programs, the Disaster Commercial and Personal Loan Program, the Hawaii Innovation Development Program and the Molokai Business Loan Program.

The records maintained by the Financial Assistance Branch include applications, resumes, company organization documents, financial statements and projections, credit reports, tax returns and notices, tax clearances, leases, insurance coverages, lists of collateral and guarantors, previous loan denials, intra-agency memoranda, loan presentations and authorizations, loan agreements, promissory notes and mortgages, releases, guarantees, insurance assignments, corporate resolutions, subordination agreements, correspondence, repayment records, annual and interim reports, loan activity reports, delinquency reports, loan activity reports, delinquency reports, other loan documents, departmental summaries and statistics and internal policies and procedures. These records may be for pending, denied, active, paid-off or delinquent loans.

A local newspaper reporter has also requested that the Office of Information Practices ("OIP") render an advisory opinion regarding access to a particular DBED loan recipient's file, specifically asking what guarantees were made by the company, the identity of any loan guarantors and what background credit checks were performed on certain company officials. The DBED Financial Assistance Branch has also received other inquiries for access to entire loan files and anticipates such requests to continue.

## DISCUSSION

I. Whether DBED Financial Assistance Branch state loan program records regarding the names of the borrowers, principals and guarantors, and their addresses and occupations are public under the UIPA.

II. Whether details regarding DBED Financial Assistance Branch state loans such as the amount, purpose and status of the loans with regard to repayment and collection efforts (including date last paid, next due date, age of delinquency if any, number of payments made and number of late payments) are public under the UIPA.

The first two issues shall be addressed jointly.

The UIPA in § 92F-11(a) sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law."[1] Section 92F-12(a)(8), amid a list of records declared public by the Hawaii Legislature "as a matter of public policy"[2], requires the disclosure of the "[n]ame, address, and occupation of any person[3] borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan."

The underlying concept of § 92F-12(a)(8) was expressed by the State of Hawaii Governor's Committee on Public Records and Privacy in its 1987 Report when discussing the issue of availability of information on loan program recipients:

> [T]hese are taxpayer funds and...taxpayers should be able to see how those funds are spent.... [T]here is also a strong interest in assuring that no special treatment has been given to anyone and that the process has been fair in all respects.
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> ....

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1 Because of the broad scope of your inquiry, we advise your agency to next examine whether a state or federal law exists which would specifically mandate or prohibit disclosure. Haw. Rev. Stat. §§ 92F-12(b)(2) and 92F-13(4) (Supp. 1988). If such a law exists, its mandate will control the issue of disclosure. In the absence of such a law, the analysis must continue under the UIPA. For the purpose of this opinion we shall assume there are no such laws.

2 "As to these records, 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).

3 "Person" as defined in Haw. Rev. Stat. § 92F-3 "means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity."

> One way to approach this area is to specify that certain information (name, occupation, amount of loan, and purpose of loan) should be public. Other material would then fall under general standards as to personal information and public record, or under a new balancing test if one is adopted. Most of the items over which concern was expressed are contained in the application, and applications have generally not been viewed as public records. This may also help to provide a useful distinction. As to loan status, repayment and enforcement efforts, it clearly is a policy choice. This is personal information but it is also taxpayer money which if not repaid, is not serving its function.

Vol. I Report of the Governor's Committee on Public Records and Privacy 114-15 (December 1987) [hereinafter Governor's Committee Report] (emphasis added).

And earlier in the same report: "The basic thrust is that anytime [sic] taxpayer money is spent, the taxpayers have a right to see how it was spent." Id. at 114.

It appears from all of the above that when an individual has borrowed public funds as part of a government loan program, or when an individual personally becomes a principal or guarantor for a government loan, the basic facts of the transaction are public including the name, address and occupation of the individual and the amount, purpose and status of the loan as stated in Haw. Rev. Stat. § 92F-12(a)(8). The amount loaned would also include whether the loan was granted in participation with a private or other governmental lending institution and the percentage that the DBED loan represented. Of course, related records held by a private financial institution would not be subject to the UIPA.

In Miami Herald Publishing Co. v. United States Small Business Admin., 670 F.2d 610 (5th Cir. 1982), the court addressed the status issue and found that information contained in guaranteed loan records, such as advance payments and remaining balances, would not likely cause substantial harm to the competitive position of SBA borrowers. And in response to a request for a list of written-off, liquidated or delinquent

loans, the court dispensed with any individual privacy interests with the following argument:

> No privacy interest or confidential character attaches to the records of loans classified as "delinquent," in liquidation," or a "charge off," because the delinquent or defaulting borrower's only realistic expectation is that the lender, whether the SBA on a direct loan or a financial institution on a guaranteed loan, will proceed against him with the full force of the law.

Miami Herald at 615.

Thus, "a delinquent SBA borrower's only legitimate expectation is that his loan and the outstanding balance will be publicly disclosed." Id. at 616.

Another SBA loan case, Buffalo Evening News, Inc., v. Small Business Admin., 666 F. Supp. 467 (W.D. N.Y. 1987), citing Miami Herald, found the names of borrowers, their addresses and the present disposition of their loans to be public: "I do not believe that disclosure in this case will harm the SBA's ability to conduct its own business as intended by Congress." Buffalo Evening News at 471 (citation omitted).

With regard to the status of the loan, we believe that the spirit of the UIPA mandates that more than just a statement as to whether the loan is current or delinquent should be disclosed to the public upon request. Loan status also includes the date last paid, next date due, the length of any delinquency, the number of payments made and the number of late payments (if government records containing such information exist). No frustration of legitimate government function will occur from the release of this information. Further, even if an individual has obtained the loan, as opposed to a business, the public interest in the disclosure of the amount of money not repaid to state or county government outweighs an individual's right to personal privacy. Haw. Rev. Stat. §§ 92F-13(1) and 92F-14(a).

Of course whenever possible, this information should be released to the public in its original form, excising or

deleting any confidential information, rather than merely summarizing public information in a newly created document.

**III. Whether DBED Financial Assistance Branch state loan program records such as loan applications, financial and credit information on applicants/principals/guarantors, intra-agency communications as part of loan "presentations", participation details, terms and conditions, guarantees and security are public under the UIPA.**

There are two main exceptions to the general rule of disclosure that apply to the types of loan records maintained by the DBED Financial Assistance Branch: (1) the § 92F-13(1) exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy", and (2) the § 92F-13(3) exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

Personal Privacy Interests

The UIPA provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1988).

In analyzing an individual's privacy interest, the UIPA legislative history directs us to consult "[t]he case law under the [federal] Freedom of Information Act ... for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). In doing so, we find that the concept of a "privacy interest" applies only to natural persons. "Only individuals have privacy interests." J. Franklin and R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts § 3.04[6][f] at 3-18 (2d ed. 1989) [hereinafter Guidebook]. "[T]he right of privacy is primarily designed to protect the feelings and sensibilities of human beings and does not protect artificial entities." HealthCentral v. Commissioner of Ins., 393 N.W.2d 625 (Mich. App. 1986). However, "[w]hile corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical." Guidebook § 1.09 at 1-119 quoting

Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980). Thus, "[t]he individual engaged in a commercial activity which is the subject of a government record may have a personal privacy interest to be protected." J. O'Reilly, 2 Federal Information Disclosure § 16.06 at 16-15 (1989) citing National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) and Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979).

The UIPA's legislative history helps to clarify the steps involved in the balancing of the public interest in disclosure against the privacy interest of the individual:

> Once a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not "significant", a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy.

Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

Thus, an individual's privacy interest must be found to be "significant" before the balancing test should even be applied. Section 92F-14(b) lists examples of information in which the individual has "a significant privacy interest", including subsection (6), "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." This type of information certainly matches some of that maintained by the DBED Financial Assistance Branch on individual borrowers (those in the Disaster Personal Loan Program, and those who operate their own businesses as sole proprietors or closely-held corporations owned by one individual), as well as on individual company principals and loan guarantors.

The UIPA language of § 92F-14(b)(6) establishing a significant privacy interest in financial information came directly from the Uniform Information Practices Code ("Model Code"), drafted in 1980 by the National Conference of Commissioners on Uniform State Laws. Hawaii House Standing

Committee Report No. 342-88, dated February 19, 1988, directs us to the Model Code commentary "where appropriate" to "guide the interpretation of similar [UIPA] provisions." The comment to § 3-101(10) of the Model Code refers to the incorporation of "a general balancing standard that must be applied on a case-by-case basis." The comment to § 3-102(b) explains that:

> [O]nce a subsection (b) or comparable privacy interest is demonstrated, the agency will have to assume the burden of carefully balancing such an interest with the public interest and need for access to those documents. If one of the nine examples applies to a request, there is a strong privacy interest in not publicly releasing the records.
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> The requester must demonstrate why the public interest weighs in favor of disclosure.

Model Code § 3-102 commentary at 23 (1980).

Thus, the DBED Financial Assistance Branch must first review the government record requested to determine if it contains any personal financial information which would establish a significant privacy interest and trigger the balancing test.

> [T]he courts have vigorously protected the personal, intimate details of an individual's life, the release of which is likely to cause distress or embarrassment. Courts regularly uphold the nondisclosure of information concerning marital status, legitimacy of children, medical condition, welfare payments, family fights and reputation, financial status, criminal histories or "rap sheets."

Guidebook § 1.09 at 1-128, 1-129 (citations omitted) (emphasis added).

We have previously concluded that when an individual has borrowed public funds as part of a government loan program, or when an individual personally becomes a principal or guarantor

for a government loan, the basic facts of the transaction are public including the name, address and occupation of the individual and the amount, purpose and status of the loan as stated in Haw. Rev. Stat. § 92F-12(a)(8). However, other financial and credit information that can be identified as relating to a specific individual should remain confidential, such as bank balances and credit reports. This last concept is important because in dealing with clearly unwarranted invasions of personal privacy, "it must be remembered that all reasonably segregable, nonexempt portions of requested records must be released." Guidebook § 1.19 at 1-135. In other words, summarizing the information that is public is not sufficient if the confidential information can fairly easily be segregated from the requested record in order that the public may inspect the actual record.

A note of caution concerning the balancing of the public interest in disclosure against an individual's significant privacy interest: "any public interest in disclosure must be given due consideration." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). Hence, there is a need for case-by-case application of the privacy balancing test.

Frustration of Legitimate Government Function

The second main exception to the UIPA's general rule mandating disclosure that applies to the DBED Financial Assistance Branch records is for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1988). In Hawaii Senate Standing Committee Report No. 2580, dated March 31, 1988, we find as an example of "records which need not be disclosed, if disclosure would frustrate a legitimate government function", "[t]rade secrets[4] or confidential commercial and financial information." "There is no dispute that this material [trade

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4 "Trade secrets" will be addressed in a separate OIP Opinion Letter responding to an opinion request with facts more closely aligned with a "trade secret" exemption analysis.

secrets and proprietary information[5]] is entitled to protection." Vol. I Governor's Committee Report at 122.

A. Definition of Terms

For some general explanation of "confidential commercial and financial information," which is language taken directly from the Model Code, we turn to the comment to § 2-103(a)(9):

> Many agencies in the exercise of regulatory powers must have access to confidential information from the businesses that they regulate. The purpose of subsection (a)(9) is to enable an agency to protect the confidentiality expectation of those submitting information. This exemption is fundamental to freedom of information legislation.

Model Code § 2-103 commentary at 17 (1980) (citations omitted).

The problem with establishing a working definition of "confidential commercial and financial information" to apply to the UIPA is that comparable language in both the Model Code and the FOIA differ. For ease of comparison, the three versions are as follows:

1. UIPA legislative history: "confidential commercial and financial information"[6]

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[5] "Proprietary information" is listed as a separate category of records in the UIPA's legislative history, including "computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right", and will also be addressed in a separate OIP Opinion Letter. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

[6] S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

2. Model Code: "confidential commercial and financial information obtained, upon request, from a person"[7]

3. FOIA: "commercial or financial information obtained from a person and privileged or confidential"[8]

These distinctions have more significance in light of the following Model Code comment:

> [I]nformation that is (a) commercial or financial, (b) confidential and (c) obtained from a person. All three elements ... must be present for the exemption to apply. This means that the agency must have obtained commercial or financial information from a non-governmental source, and the information must be confidential.

Id. (citations omitted).

For the purpose of applying the UIPA to DBED Financial Assistance Branch records obtained from loan applicants or other non-governmental sources, such as applications, resumes, company organization documents, financial statements and projections, credit reports, tax returns and notices, leases, insurance coverages, previous loan denials and corporate resolutions, the omission of "obtained from a person" has no significance because the records indeed have been submitted by the person applying for the loan.

But for the purpose of applying the UIPA to records not obtained from loan applicants or other non-governmental sources, and thus either created within the agency (though the loan applicant may sign them) or obtained from other governmental sources, such as lists of collateral and guarantors, intra-agency memoranda, loan authorizations, loan agreements, promissory notes and mortgages, releases, guarantees, insurance assignments, subordination agreements,

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[7] Model Code § 2-103(a)(9) at 15.

[8] 5 U.S.C. § 552(b)(4) (1989).

correspondence, repayment records, loan activity reports, delinquency reports and other loan documents, the conscious and purposeful omission of such language could mean the difference between some of the information contained therein being confidential or public under the Uniform Code or the FOIA. However, this distinction may not be as critical under the UIPA due to the broad definition of the term "person" in § 92F-3. Therefore, what is critical under the UIPA will be the content of the document, not just the source from whom it was obtained.

Leaving the discussion of whether the omission of "obtained from a person" was deliberate and intentional by the UIPA drafters, and thus significant for this inquiry, we move on to define the three main terms in the UIPA's version: "confidential", "commercial", and "financial." The Model Code provides a definition of "confidential" commercial or financial information:

> Material has been held to be confidential if: (1) it would not customarily be released to the public by the person from whom it was obtained; (2) disclosure would impair an agency's ability to obtain similar information in the future; or (3) disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. (citations omitted).

In creating the UIPA's exceptions to its general rule of disclosure, and introducing the examples for privacy and frustration of legitimate government function, the Hawaii legislature chose to "categorize and rely on the developing common law", which "is ideally suited to the task of balancing competing interest [sic] in the grey areas and unanticipated cases, under the guidance of the legislative policy." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). We can thus look to case law outside Hawaii in further defining the frustration of government function exception.

"The case law has stressed that the terms commercial or financial are to be given their ordinary meanings. The fact

that a company wishes to keep certain records a secret does not make them commercial in nature." Guidebook § 4.02[2][a] at 4-7 (footnote omitted) citing Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); Washington Post Co. v. Dep't. of Health & Human Serv., 690 F.2d 252, 266 (D.C. Cir. 1982); and Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980). "Examples of items generally regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition." Guidebook § 1.07 at 1-71 (citation omitted). Certainly many of the records maintained by the DBED Financial Assistance Branch, such as financial statements, contain same of these items that would likewise be categorized as commercial or financial information.

The FOIA's legislative history also provides some insight into the nature of the exemption for "trade secrets and commercial or financial information obtained from any person and privileged or confidential":

> The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments.... It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 2418, 2427.

And from an earlier report:

> Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The above language appears to create a fairly broad and expansive exemption from disclosure; however, we caution that subsequent cases have followed Congress' disclosure mandate by construing the FOIA itself broadly and its exemptions narrowly.

B. Competitive Harm Test

The two early FOIA cases of Benson v. General Serv. Admin., 289 F. Supp. 590 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969), and Sterling Drug, Inc., v. FTC, 450 F.2d 698 (D.C. Cir. 1971), illustrate the problems related to basing exemptions to 5 U.S.C. 552(b)(4) ("(b)(4)") on whether the government has promised confidentiality, and on whether the information in question is the type that the person from whom it was obtained would not ordinarily release to the public. Benson found an appraisal report prepared for the government by an outside consultant not to be protected by the (b)(4) exemption because the government had made no promise to the consultant to keep the information confidential on his behalf, and then found a Dun and Bradstreet credit report confidential because the report stated that it was prepared "in strict confidence." Benson, 289 F. Supp. at 594. In Sterling Drug, market, sales, profit and cost data were found confidential because the agency had agreed to treat them so and because the information was of the type that "would customarily not be released to the public by the person from whom it was obtained." Sterling Drug at 709.

In 1974, the leading case of National Parks & Conservation Ass'n v. Morton ("National Parks I"), 498 F.2d 765 (D.C. Cir. 1974), was decided, focusing on the meaning of the word "confidential" in exemption (b)(4). National Parks I noted that the FOIA "unfortunately" contained no definition of "confidential" and stated that:

> [w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is "confidential" for purposes of section 552(b)(4). A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption.

Id. at 767 (emphasis added).

The opinion later quoted FOIA hearings testimony regarding an agency loan program that required "detailed financial, economic and technical information from applicants" where public release "would provide an unfair advantage to a borrower's competitors." Id. at 769. In summary, the National Parks I court held that commercial or financial information was "confidential" if its disclosure was likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. at 770 (footnote omitted). The court then clarified that merely because information was not the type generally made available to the public was not enough to keep the information confidential. Id. In closing, the court noted that "inappropriate disclosures" could be prevented by excising confidential material from "otherwise disclosable documents." Id. at 771.

The Model Code's previously cited definition of "confidential" must then be applied only in light of National Parks I and its progeny. Since National Parks I, several FOIA cases have considered fact situations helpful in determining which of the DBED Financial Assistance Branch documents contain information that should be seen as "confidential" and thus exempt from disclosure.

In applying the second part of National Parks I's definition of "confidential", the courts have recognized the disclosure of the following information as generally causing competitive harm:

> [A]ssets, profits, losses and market shares, data describing a company's workforce which would reveal labor costs, profit margins and competitive vulnerability, a company's selling prices, purchase activity and freight charges, technical and commercial data, names of consultants and subcontractors, performance, cost and equipment information, shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company, and technical proposals which are submitted, or

> could be used, in conjunction with bids on government contracts.

Guidebook § 1.07 at 1-79 (citations omitted).

Conversely, the following information has generally not qualified as "confidential": "'mundane' information regarding submitter's operation", "general description of manufacturing process with no details", "aggregate contract price" for a government purchase per a unique contract with the agency involved in product design, contract wage and benefit breakdown "where labor contracts vary from bid to bid", merely "embarrassing" disclosures even if actual harm did result and disclosures causing "customer or employee disgruntlement." Guidebook § 1.07 at 1-79 - 1-80.

It should be emphasized that a mere allegation of possible competitive harm is not enough for exemption (b)(4) to apply. The party seeking to avoid disclosure bears the burden of proving that "(1) they actually face competition, and (2) substantial competitive inquiry would likely result from disclosure. Failure to make the necessary showing on either point would require a court to compel disclosure under the National Parks I test." National Parks & Conservation Ass'n v. Kleppe ("National Parks II"), 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations are indeed unacceptable as means of sustaining the burden of nondisclosure under the FOIA." Id. at 680. National Parks II then develops the concept of another balancing test, separate from that of balancing the public right to know against a significant privacy interest to determine if disclosure would indeed result in an unwarranted invasion of privacy. The National Parks II balancing test applies to exemption (b)(4) and balances the opposing interests of those seeking to investigate how the government is doing its job against those resisting disclosure "on the ground that it would seriously harm their competitive positions." Id. at 687.

This new balancing test was applied in Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804 (D.D.C. 1979), where a FOIA action was brought to compel disclosure of a loan agreement and progress reports relating to the loan, made by a federal agency offering financial assistance for the purpose of enhancing U.S. trade. The withheld material obviously contained commercial or financial information and was found to

have been "obtained from a person." Thus the central issue became whether the information contained in the withheld documents was "confidential."

The court reviewed National Parks I's two-part definition of "confidential", then stated that "[b]ecause conclusory and generalized allegations are unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, specific factual or evidentiary material is required to support application of the (b)(4) exemption." Comstock at 807 (citation omitted). The court then concluded that the first part of National Park I's definition, that of impairing the government's ability to obtain necessary information in the future, did not apply to exempt the progress reports from disclosure, because the federal agency loaning the funds could "mandatorily condition loan approval on [their] submission." Id. at 809. This language has critical bearing on the documents maintained by DBED's Financial Assistance Branch and, together with the following reference to National Parks II's standard of proof, makes a strong statement for disclosure:

> In a FOIA action in which the principal issue is whether disclosure of the requested documents would cause substantial competitive harm to a party seeking to avoid disclosure, such party is required to prove that it actually faces competition and that substantial competitive injury will likely result from disclosure.

Id. (citation omitted).

However, after reviewing the evidence, the court concluded that the information "would produce substantial competitive harm" and allowed the documents to be withheld under exemption (b)(4). Id. at 810.

Once established, the likelihood of causing competitive harm must then also be seen as interfering with the agency's ability to conduct its normal business. The UIPA's legislative history made the exemption for "confidential commercial and financial information" dependent upon the resulting "frustration of a legitimate government function." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Thus, for information to be exempt from disclosure under the confidential commercial and financial information exemption of the UIPA, it must meet the definitions of "confidential" (per the National Parks I and II tests) and "commercial or financial", and then its disclosure must frustrate a legitimate government function. And even then, the agency is not prohibited from releasing the information ("need not be disclosed").

The comment to § 2-103 of the Model Code also refers to this concept of balancing the public interest:

> [S]ubsection (a) only gives an agency the authority to withhold exempt material. It does not compel the agency to withhold if its officers believe that disclosure would be in the public interest.

Model Code § 2-103 commentary at 16 (1980).

The issue of frustration of a legitimate government function as it relates to intra-agency communications, such as DBED Financial Assistance Branch loan presentations, will be addressed in a future OIP opinion letter focusing on the status of inter-agency and intra-agency memoranda.

**IV. Whether the fact that a loan application has been denied, cancelled, withdrawn or is in process may be disclosed under the UIPA.**

Information regarding whether a person's loan application has been denied, cancelled, withdrawn or is in process may be disclosed under the UIPA. The disclosure of this "status" type of information would not invade an individual's right to privacy, nor would it frustrate any legitimate government function under Haw. Rev. Stat. § 92F-13. However, the details of why a loan was denied, cancelled or withdrawn might be protected from disclosure depending on the basis for the decision.

**V. Whether DBED Financial Assistance Branch statistical summaries or information regarding an applicant's bankruptcy status are public under the UIPA.**

DBED Financial Assistance Branch statistical summaries,

such as loan activity reports and delinquency reports, are public under the UIPA. However, "an agency shall not be required to prepare a compilation or summary of its records" for purposes of responding to a records request "[u]nless the information is readily retrievable by the agency in the form in which it is requested." Haw. Rev. Stat. § 92F-11(c) (Supp. 1988).

Any information regarding an applicant's bankruptcy status which is contained in public documents filed with the United States Bankruptcy Court would be deemed public under the UIPA. For instance, if DBED maintains copies of Bankruptcy Court-filed documents that are not protected from disclosure by an order of the court, then DBED may allow public access and copying of those records or information within the records.

VI. Miscellaneous questions regarding the duration of records retention, the purpose of the record request and whether the request and response must be in writing.

In response to your question regarding records retention, we refer you to the DBED Departmental Records Retention Schedule for approved document destruction time frames. The State Archives, Department of Accounting and General Services, by law has jurisdiction over issues of records retention.

The UIPA makes no distinction between new, present and previous borrowers. This is because as long as the information falls within the UIPA definition of "government record", then the UIPA applies regardless of the date the record was created.

With regard to the information made public in § 92F-12(a)(8) (name, address and occupation of any person borrowing funds from a state or county loan program and the amount, purpose and current status of the loan), any person may have access to that information. The purpose of the inquiry is irrelevant to the record request since the information is deemed public.

There presently is no requirement for a signed acknowledgement from submitters, nor is there a requirement that record requests under Part II of the UIPA be in writing. However, this issue and many of the other practical matters you raised will be addressed in the administrative rules soon to be adopted by the OIP.

## CONCLUSION

We cannot give blanket "yes" or "no" answers to many of your questions regarding the disclosure of specific documents. The answers will ultimately depend on the nature of the information contained in each document. It is the information itself that gives rise to any applicable exemption from disclosure, not the type of document in which it appears.

Specific UIPA exemptions from disclosure do exist for some of the information contained in the records maintained by the DBED Financial Assistance Branch. The personal privacy exemption will initially exempt such individually identifiable information as personal finances and credit information, and this exemption may extend to the individual who does business in his sole capacity. But the public interest in disclosure must be weighed against individual privacy interests. Privacy is never absolute, especially when accepting public funds. Similarly the exemption for confidential commercial and financial information may protect from disclosure information that if released, could cause the frustration of a legitimate government function. But the public interest in overseeing the operations of government must also be considered and weighed.

Departmental staff should familiarize themselves with the main definitions and balancing tests that apply to individual privacy interests and confidential commercial and financial information, remembering their responsibility to segregate wherever practicable by deleting the exempted information. Please do not hesitate to contact the OIP whenever questions arise regarding the application of the UIPA to your agency records.

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