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April 26, 1994

Mr. John Atchison
[Address Withheld]

Dear Mr. Atchison:

Re: Application of the UIPA to the Villages of
Kapolei Association

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning whether the State's public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), applies to the Villages of Kapolei Association ("Association"), a nonprofit corporation organized under chapter 415B, Hawaii Revised Statutes.

ISSUE PRESENTED

Whether the Association is an "agency" for purposes of the UIPA.

BRIEF ANSWER

In defining the term "agency" as used in the UIPA, the Legislature included within its coverage a "corporation or other establishment owned, operated, or managed by or on behalf of this State or any county." Haw. Rev. Stat. §92F-3 (Supp. 1992).

In previous opinion letters, we concluded that in determining whether a nonprofit corporation is an "agency" for purposes of the UIPA, it is necessary to examine the totality of circumstances surrounding the operation of the corporation. Such an examination should include a consideration of whether the corporation performs a governmental function, the level of governmental funding, the extent of governmental regulation or control, and whether the entity was created by the government.

In examining the totality of circumstances surrounding the creation and operation of the Association, we believe that it is not an "agency" for purposes of the UIPA. While the Association

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was created by the State of Hawaii, and the State appointed the Association's first Board of Directors ("Board"), the Board is currently elected by the Association's membership. Thus, the Association's members, not the government, control the business affairs of the Association.

Further, the financial operations of the Association are subsidized by maintenance assessments paid by the Association's members, and the Association's operations are not subsidized by the State. Finally, there is no evidence that the Association performs a government function. The purpose of the Association is to manage, control, operate, maintain, repair, and improve the property owned by the Association. The Association is comprised of persons owning real property that is subject to the Declaration of Covenants, Conditions, and Restrictions for the Villages of Kapolei. Thus, like other homeowner or condominium associations, the Association exists for the benefit of its members, and not to perform a government function.

Accordingly, despite the fact that the State created the Association, we conclude that under the totality of circumstances the Association is not an "agency" for purposes of the UIPA. Therefore, the disclosure of the Association's records is not governed by the UIPA.

FACTS

On August 3, 1990 the State Housing and Finance Development Corporation ("HFDC"), an agency attached to the Department of Budget and Finance for administrative purposes, filed a Declaration of Covenants, Conditions, and Restrictions for the Villages of Kapolei ("Declaration") with the Bureau of Conveyances as Document No. 1752838.

The Declaration states:

1.01. The Property. Declarant is the owner in fee simple of that certain real property located in the District of Ewa, City and County of Honolulu, State of Hawaii, more particularly described in Exhibit A attached hereto and incorporated herein (hereinafter referred to as the "Property").

1.02. The Community Area. Declarant intends to develop or convey to Developers who will in turn develop portions of the Property (such portion to be developed hereinafter referred to as the "Community Area") with Residences, Commercial Lots, community facilities, employment centers,

parks, open space areas and such other related and complimentary uses pursuant to the plan for a community development to be collectively named Villages of Kapolei (hereinafter referred to as "Villages of Kapolei")

1.03. Villages of Kapolei. Villages of Kapolei will combine practical usefulness and economic benefit with aesthetic enjoyment in a complete town setting that will grow and intensify in its uses, densities, and activities, year by year, resulting in the establishment of an urban community, specifically distinct from a uniform, detached urban development.

1.04. Covenants, Conditions, and Restrictions. In order to enhance the orderly and proper development and use of the Property and the Community Area pursuant to the plan for the Villages of Kapolei, to protect the value, desirability and attractiveness of Villages of Kapolei and to promote the quality of improvement and use of the Property and the Community Area as a whole, Declarant deems it necessary and appropriate to subject all of the Property and Community Area to certain mutual covenants, conditions, and restrictions which will inure to the benefit of all present and future owners of the Property and the Community Area.

. . . .

7.01 Organization.

The Association shall be organized as a nonprofit corporation under HRS Chapter 415B. The Association shall have the duties, obligations, and powers set forth in this Declaration, and in the Association's Articles of Incorporation and By-Laws.

Declaration at 1-2.

On May 23, 1990, Articles of Incorporation for the Villages of Kapolei, a nonprofit corporation, were filed with the Department of Commerce and Consumer Affairs's Business

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Registration Division. The Articles of Incorporation for the Villages of Kapolei Association provide that the purposes of the Association are to:

[P]rovide for the management, maintenance, care, and control of the common areas and facilities, and the control of the architectural design and development of real property in the District of Ewa, City and County of Honolulu, State of Hawaii, within the area known as the Villages of Kapolei, as defined in that certain Declaration of Covenants, Conditions and Restrictions of Villages of Kapolei ("the Declaration"), made by the Housing Finance and Development Corporation, a body corporate and body politic of the State of Hawaii ("Declarant"), filed or to be filed with the Office of the Assistant Registrar of the Land Court of the State of Hawaii, as the same may be amended from time to time as therein provided, to be conveyed by Declarant to the Association, and also to protect the value, desirability and attractiveness of the aforesaid property and to promote the health, safety, and welfare of the members of the Association.

Article IV, Articles of Incorporation of Villages of Kapolei Association (May 21, 1990).

The Association is governed by a Board of Directors ("Board"). Members of the Association's initial Board were appointed by the HFDC, and HFDC employees constituted a majority of the initial Board. See Article IX, Articles of Incorporation of Villages of Kapolei Association. At this time, however, only one HFDC employee is a member of the Association's Board and the members of the Association, by annual election, fill seats on the Association's Board.

The State is the fee simple owner of the real property subject to the Declaration. The Villages are being developed in phases involving eight separate villages. The HFDC has conveyed the ownership of property for villages one through four to developers, and retains ownership of real property that will constitute villages five through eight. The State recently allotted development rights to Village number five. The property will eventually be conveyed by the State to developers who will develop these villages.

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You have requested the OIP to provide you with an advisory opinion concerning whether, under the UIPA, you have the right to inspect and copy records maintained by the Association.

DISCUSSION

The UIPA, the State's public records law, states "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying upon request by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). The term "agency" is defined in section 92F-3, Hawaii Revised Statutes, as follows:

"Agency" means any unit of government in this State, any county, or any combination of counties; department; institution; board, commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).

In OIP Opinion Letter No. 90-31 (Oct. 25, 1990), we addressed whether a nonprofit corporation, the Hawaiian Humane Society ("HHS"), was an "agency" for the purposes of the UIPA. After researching both federal and state case law interpreting the definition of "agency" for purposes of public records laws, we found that:

[W]hether an entity is an "agency" for purposes of the UIPA must be made on a case-by-case basis based on the totality of circumstances. Each new arrangement must be separately considered in its own context given the myriad of organizational arrangements for getting the business of government done. Further, it is clear that an entity is not "operated on behalf of" the State or any county, and, therefore, an agency under the UIPA, merely by contracting with a government agency. In addition, we decline to follow the decisions of federal

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courts applying FOIA's definition of agency that require virtual day-to-day supervision and control over an entity's activities before an entity is considered an "agency." On its face, the definition of "agency" set forth in section 92F-3, Hawaii Revised Statutes, is far more expansive than that set forth by the FOIA . . . [h]owever, at a minimum, under the UIPA, we believe that an entity must perform what may reasonably be considered a governmental function before it may be included within the coverage of the Act.

OIP Op. Ltr. No. 90-31 at 14 (Oct. 25, 1990).

In OIP Opinion Letter No. 93-18 (Oct. 20, 1993), we concluded that Akaku-Maui Community Television, Inc., a non-profit corporation organized to provide community broadcasting, was not an "agency" for purposes of the UIPA, even though the Department of Commerce and Consumer Affairs appointed the majority of the corporation's initial board of directors. We opined:

Although we believe that Akaku, by providing community broadcasting on Maui, is performing a service that benefits the public interest, we do not believe that it is performing a governmental function. We note that "public" broadcasting may be considered a governmental function under chapter 314, Hawaii Revised Statutes, however, our research has not revealed any section of the Hawaii Revised Statutes that requires a government agency to provide "community" broadcasting. Nor are we aware of any legal authority that has found community broadcasting to constitute a government function.

Moreover, the State is not involved with the operations of Akaku, nor does it manage Akaku. Funds paid to Akaku directly derive from cable television companies' gross revenues, and Akaku is not supported by taxpayer funds. Given the totality of circumstances surrounding Akaku's operations, we believe that Akaku is not "owned, operated, or managed by or on behalf of this State or any county."

OIP Op. Ltr. No. 94-5

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OIP Op. Ltr. No. 93-18 at 4 (Oct. 20, 1993).

In turning to an examination of the circumstances surrounding the Association's creation and current operation, it is true that: (1) the HFDC was the fee simple owner of the property subject to the Declaration, and retains title to some of the villages that are under development; (2) the HFDC created the Association by filing Articles of Incorporation, and filed the Declaration of Covenants, Conditions, and Restrictions Villages of Kapolei; and (3) the HFDC appointed the Association's initial Board.

Nevertheless, at this time, only one employee of the HFDC sits on the Association's Board, and members of the Association annually elect Association members to the Board. As such the Association's membership, and not the State, control the governance of the Association's business and affairs. While the HFDC played a substantial role in the development of the Villages of Kapolei and the creation of the Association, the Association is now governed much like any other homeowners association or condominium association. The Association is financially supported by the payment of maintenance assessments by Association members as determined by the Board in accordance with section 8.03 of the Declaration. Thus, the operations of the Association are not subsidized by the State.

Under these circumstances, and given the foregoing OIP opinion letters concerning the scope of the term "agency" under the UIPA, the OIP cannot conclude that the Association performs a government function, or that the Association is "owned, operated, or managed by or on behalf of" the State as used in the definition of "agency" set forth in section 92F-3, Hawaii Revised Statutes.

Therefore, we conclude that the Villages of Kapolei Association is not an "agency" for purposes of the UIPA, and that the disclosure of the Association's records is not governed by the UIPA.¹

CONCLUSION

The Association is not an "agency" for purposes of the UIPA since: (1) the Association's affairs are controlled by its Board, the members of which are elected by the Association's membership, (2) the Association does not perform a government function any

¹See, e.g., Haw. Rev. Stat. § 514B-45 (1985) (records of a nonprofit corporation "may be inspected by any member or member's agent or attorney, for any proper purpose at any reasonable time").

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more than other homeowners' or condominium associations, and (3) the operations of the Association are not subsidized by the State. Accordingly, we conclude that the UIPA does not govern the disclosure of records of the Association.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

HRJ:sc

c: Mr. Joseph Conant, HFDC
M. Anne Anderson, Esq.