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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Rick Sakata
Agency: Department of Labor and Industrial Relations, Disability Compensation Division
Date: October 12, 2016
Subject: Attachments to Collectively Bargained for Workers' Compensation Benefits Agreement (U APPEAL 14-2)

REQUEST FOR OPINION

Requester seeks a decision as to whether, under Part II of the UIPA, the Department of Labor and Industrial Relations Disability Compensation Division (DLIR-DCD) properly denied Requester's request for a copy of all attachments to the Collectively Bargained for Workers' Compensation (CBWC) Addendum approved on March 28, 2013 (Attachments).[1]

[1] The signatories to the CBWC Addendum were the United Brotherhood of Carpenters and Joiners of America, Local 745 and its successor in interest, the Hawaii Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America; Laborers' International Union of North America, Local 368; Operating Engineers Local Union No. 3 of the International Union of Operating Engineers; International Union of Bricklayers & Allied Craftworkers, Local 1 of Hawaii; Operative Plasters' & Cement Masons International Association of the United States and Canada, Local 630 (collectively referred to in this opinion as "Basic Trades"); and the General Contractors Labor Association and the Building Industry Labor Association (collectively referred to in this opinion as "Associations"); and Signatory Individual Employer: S&M Sakamoto, Inc. (Employer).

Unless otherwise indicated, this decision is based solely upon the facts presented in e-mails between Requester and DLIR-DCD dated June 24, 26, 27, and July 1, 3, 5, and 10, 2013; a letter from DLIR-DCD to Requester dated July 9, 2013 granting in part Requester's record request; letters from DLIR-DCD to OIP dated August 15, 2013 and April 8, 2016; and a letter to OIP dated August 21, 2013 from Mr. Sidney Wong, counsel for Pioneer Solutions, LLC (Pioneer), the Program Facilitator/Program Administrator for the CBWC program under the CBWC Addendum seeking to protect from disclosure the attachments to Pioneer's CBWC Addendum submitted to the DLIR-DCD.

QUESTION PRESENTED

Whether the Attachments are protected from disclosure as being attorney work product, confidential commercial and financial information, or trade secrets.

BRIEF ANSWER

No. The Attachments must be disclosed. The Attachments are not attorney work product, confidential commercial and financial information, or trade secrets. No exceptions to disclosure in section 92F-13, HRS, allow DLIR-DCD to withhold the Attachments.

FACTS

Generally, in the State of Hawaii, if an employee is injured as the result of an accident or by disease resulting from his/her employment, the employer is responsible for providing benefits pursuant to statute. HRS § 386-3 (2015). Hawaii's workers' compensation law also provides that

> [n]otwithstanding any provision of law to the contrary, any employer may determine the benefits and coverage of a policy required under this chapter through collective bargaining with an appropriate bargaining unit; provided that the bargained agreement shall be reviewed by the director to ensure that the agreement does not provide benefits and coverage less than those provided in this chapter.

HRS § 386-3.5 (2015).

One such collectively bargained agreement involves the Basic Trades.[2] Requester was the claims administrator for the initial Basic Trades CBWC

[2] The Basic Trades signatories to the CBWC Addendum were the same as for the original CBWC agreement.

agreement approved by DLIR-DCD on September 27, 2007. Requestor was subsequently replaced as Claims Administrator by Pioneer when the CBWC was superseded by a CBWC Addendum.

On March 28, 2013, the DLIR-DCD approved the CBWC Addendum, which states that the CBWC Addendum superseded the initial Basic Trades CBWC approved on September 27, 2007. The top of each page of the CBWC Addendum and some of the attachments state "THIS DOCUMENT OR ANY PORTION OF IT MAY NOT BE COPIED, REPRODUCED OR USED WITHOUT THE EXPRESS WRITTEN CONSENT OF PIONEER SOLUTIONS LLC." The CBWC Addendum included the following numbered attachments:

1) A description of the structure, authority, and duties of the Labor Management Oversight Committee (LMOC).[3]
2) A limited list of medical/health care providers from which an injured worker can select.
3) A form for the purpose of nominating a medical/health care provider to be added to the LMOC's provider list.
4) A limited list from which any party wishing to have an IME[4] must select a provider.
5) A limited list of vocational rehabilitation providers from which an injured worker can select.
6) A list of types of injuries and cases that are generally to be handled under the regular Hawaii statutory workers' compensation program administered by the DLIR-DCD.
7) An explanation that under the CBWC Addendum program, disputes will be resolved by going through an Alternative Dispute Resolution (ADR) Program

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[3] The LMOC was tasked with overseeing the implementation of the CBWC Addendum. The LMOC consists of representatives from the member Basic Trades and member associations/employers, who were the signatories to the CBWC Addendum and listed in footnote 1, supra. Upon approval by the LMOC, additional persons or entities may become member parties to the CBWC Addendum and the Attachments.

[4] Paragraph I, Article IV, MEDICAL PROVIDERS, PRESCRIPTION MEDICINE PROVIDERS, VOCATION REHABILITATION PROVIDERS AND INDEPENDENT MEDICAL EVALUATORS, page 6, of the CBWC Addendum provides that

> [t]he LMOC shall establish a list of authorized independent medical providers to perform independent medical examinations ("IMEs"). . . . In the event of any disagreement or dispute over a medical issue, the sole recourse for either party shall be limited to one opinion respectively from an IME provider selected from the IME Provider List. By agreement of the parties, or at the discretion of the Ombudsman, an opinion from a third IME provider on the IME Provider List may be obtained, and no further IMEs shall be allowed.

involving the following three stages: CBWC ombudsman, mediation, and arbitration.

8) A limited list of mediators from which the administrator will select if the dispute requires mediation.
9) A limited list of arbitrators from which the administrator will select if the dispute requires arbitration.
10) A form to be used by a party to the CBWC claim to make requests regarding the ADR process.

Paragraph L, Article V, ALTERNATIVE DISPUTE RESOLUTION PROGRAM AND LMOC'S DUTIES AND POWERS, page 8, of the CBWC Addendum provides that "[a]ll employees and Individual Employers shall make good faith efforts to expedite resolutions [sic] of all matters subject to this Addendum." Furthermore, Sub-Paragraph A.3., Article VI, OMBUDSMAN, MEDIATOR AND ARBITRATOR, page 9, of the CBWC addendum states that "[t]he Ombudsman shall receive complaints and inquiries from employees who have filed claims under this Addendum."

In an e-mail dated June 24, 2013, Requester made a written request to DLIR-DCD for a copy of the revised CBWC agreement for the Basic Trades Unions. By letter dated July 9, 2013, DLIR-DCD transmitted to Requester a copy of the CBWC Addendum and Attachment 2 to the CBWC Addendum. The remainder of the requested records were withheld after Pioneer asserted that Attachments 1 and 3 through 10 (Other Attachments) to the CBWC Addendum were either "attorney work product or confidential commercial and financial information and/or constitutes trade secrets."[5] Pioneer claimed that the Other Attachments should not be disclosed because

1) They were jointly owned by Pioneer and the LMOC;
2) They were created and developed by the Plan Administrator's Attorney;
3) They were separately approved by the LMOC;
4) Because of how the attachments were developed and approved, they fall into the category of attorney work product or "confidential commercial and financial information and/or constitutes trade secrets;" and
5) Under section 92F-13(3), HRS, they must be kept confidential in order to avoid the frustration of a legitimate government function.

Consequently, DLIR-DCD advised Requester "that the release of the other attachments, if needed, will require the securing of an opinion from the Office of Information Practices based upon the objections raised to their disclosure [by Pioneer]."

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[5] DLIR-DCD was aware that Requester was either the Plan Administrator or chief sponsor of a competitor to Pioneer's workers' compensation program.

Requester then appealed the DLIR-DCD's denial of the Other Attachments to OIP. On July 22, 2013, OIP sent out a Notice of Appeal to DLIR-DCD regarding its denial of access to government records. DLIR-DCD replied on August 15, 2013 and provided OIP with a photocopy of the CBWC Addendum and Attachments for OIP's *in camera* review. In a footnote, DLIR-DCD wrote that

> [a]lthough the Department does not adopt [counsel for Pioneer's] position on the non-disclosability of the attachments[,] the Department believes that the information contained within the attachments are an essential component of the overall Collective Bargaining Worker's Compensation Agreement as without them Pioneer Solutions LLC's plan would in all likelihood not be approvable.

On August 21, 2013, Pioneer wrote to OIP to submit additional information regarding the Other Attachments. Although Pioneer objected to the disclosure of any of the documents, its primary objection was to disclosure of the Other Attachments. According to Mr. Wong, Pioneer never intended for the CBWC Addendum and any of the Attachments to be publicly disclosed. Pioneer claimed that its documents were submitted to DLIR-DCD as confidential business information and that

1) DLIR had the authority to deny a record request if disclosure would frustrate a legitimate governmental function.
2) Disclosure will impair the government's ability to obtain information and meet the purposes of section 386-3.5, HRS.
3) Disclosure will cause substantial harm to the competitive position of the Pioneer Plan.

On March 29, 2016, OIP wrote to the DLIR-DCD to obtain clarification as to whether the DLIR-DCD believed that Pioneer had provided the Other Attachments voluntarily or whether the submission was actually mandatory in order for Pioneer to participate in the CBWC program. The DLIR-DCD replied on April 8, 2016 that

> [p]ursuant to Section 386-3.5, Hawaii Revised Statutes, the Department is statutorily mandated to determine if the workers' compensation benefits provided by a negotiated benefits package provides workers' compensation benefits at least as good as the benefits provided by Hawaii Law. Although the Department believes that Pioneer provided the information technically voluntarily, an incomplete or redacted benefits plan would not likely be approved as the Department would be unable to make the statutorily required assessment and would be unaware what the redacted or left out portions of the plan actually provided.

DISCUSSION

I. The Attachments Are Not Attorney Work-Product Prepared in Anticipation of Litigation

Pioneer has asserted that the Other Attachments should not be disclosed because they are protected by the attorney work product doctrine. Records that are covered by the attorney work product doctrine may be withheld from disclosure under section 92F-13(2), (3), and (4), HRS. OIP Op. Ltr. No. 92-14 at 2. However, in OIP Opinion Letter Number 92-14, OIP stated that the attorney work product doctrine only applies to documents "prepared or obtained because of the prospect of litigation." Id. at 7. Pioneer has not provided any facts or information to support the proposition that the Other Attachments were prepared or obtained in anticipation of litigation. Instead, it appears that the CBWC Addendum and Attachments were prepared solely to enable the signatory Basic Trades, Associations and Employer to qualify to provide workers' compensation benefits under a CBWC program. Thus, the CBWC Addendum and Other Attachments are not protected from disclosure under the attorney work product doctrine.

II. The Other Attachments Are Not Confidential Commercial and Financial Information

Section 92F-13(3), HRS, does not require the disclosure of records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. OIP has previously found that to avoid the frustration of a legitimate government function, an agency is not required to disclose confidential commercial and financial information. OIP Op. Ltr. No. 92-17 at 10. In its August 15, 2013, letter to OIP, DLIR-DCD stated that "Mr. Wong further advised that these attachments to the Collective Bargaining Workers' Compensation Agreement should also be excluded from disclosure under Section 92F-13(3), HRS, where government records, by their nature, must be kept confidential in order for the government to avoid the frustration of a legitimate government function." (Footnote omitted.) As noted previously, DLIR-DCD does not adopt Pioneer's position on the non-disclosability of the Other Attachments.

The recent Hawaii Supreme Court opinion in Peer News LLC v. City and County of Honolulu 138 Haw. 53, 75, 376 P.3d 1, 23 (2016) ("Peer News"), cited with approval

> OIP Opinion Letter No. 98-02, [where] the OIP addressed arguments made by Hawai'i Management Alliance Association (HMAA) that the disclosure of eligible charges listed in HMAA's contract with Kona Community Hospital (KCH) would frustrate a legitimate government purpose. OIP Op. Ltr. No. 98-02, at 1, 9[.] . . . HMAA argued that

disclosure of the charges would mean other healthcare benefits companies would discover KCH's lowest acceptable price, which would mean they could negotiate lower payments to KCH, which in turn would result in higher copayments for patients. Id., at 9. The OIP stated that:

> Although HMAA raises these frustration arguments on behalf of KCH and [Hawai'i Health Systems Corporation], the federal courts have refused to allow a submitter to make such an argument on a government agency's behalf, particularly where the agency declines to make the argument itself. Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (where an agency declines to argue that disclosure of information would impair the agency's ability to obtain similar information in the future, the court will not allow the submitter to raise the issue on the agency's behalf). And in Comdisco, Inc. v. GSA, 864 F.Supp. 510 (E.D. Va. 1994), the court deferred to the agency's determination that disclosure of the requested information would not impair the agency's ability to obtain such information in the future. The Comdisco court observed that the agency is in the best situation to determine if disclosure would inhibit future submissions. Id. at 515.

Peer News, 138 Haw. at 75, 376 P.3d 23 (citing OIP Op. Ltr. No. 98-2 at 9-10)

The Peer News opinion makes clear that the agency, not a party, must raise a frustration argument to exclude a record from disclosure under section 92F-13(3), HRS. Here, DLIR-DCD did not agree with Pioneer's arguments for non-disclosure and did not raise the argument, and consequently, Pioneer cannot raise the "frustration of a legitimate government function" exception on behalf of the agency, DCCA-DCD. OIP thus finds that disclosure would not result in the frustration of a legitimate government function and concludes that the Other Attachments are not protected from disclosure under this UIPA exception as being confidential commercial and financial information.

Even if DLIR-DCD had raised the frustration argument, OIP believes that this exception would not apply and DLIR-DCD would be required to disclose the attachments. The inquiries regarding whether records constitute confidential commercial and financial information are fact-specific. OIP previously adopted the following test to determine if commercial and financial information is "confidential," allowing an agency to withhold records when disclosure would: "(1) impair

government's ability to obtain information in the future; or (2) . . . cause substantial harm to the competitive position of the submitter of information." OIP Op. Ltr. No. 92-17 at 11.

Protection under the impairment prong has been denied "where participation of the information submitter in a program . . . is technically voluntarily, yet submission of the information is actually mandatory if the submitter wishes to enjoy the benefits of participation." Id. As noted in its letter of August 15, 2013, DLIR-DCD did not adopt Pioneer's frustration argument on the non-disclosability of the attachments. DLIR-DCD stated that "the attachments are an essential component of the overall [CBWC] Agreement as without them Pioneer Solutions LLC's plan would in all likelihood not be approvable." Furthermore, in its letter of April 8, 2016, DLIR-DCD believed that although "Pioneer provided the information technically voluntarily, an incomplete or redacted benefits plan would not likely be approved as the Department would be unable to make the statutorily required assessment[.]" DLIR-DCD has thus clearly stated that without the Attachments to the CBWC Addendum, Pioneer's CBWC program would not have been approved.

Pioneer's position is that it would not have submitted the Other Attachments if Pioneer knew that they could be disclosed under the UIPA. But if Pioneer had not submitted the information contained in the Other Attachments, the CBWC Addendum without attachments would not have been approved and Pioneer and the signatories to the CBWC Addendum would not have been able to participate in an approved CBWC program. In reality, therefore, the information in the Other Attachments was mandatory for approval of the CBWC Addendum and it is unlikely that disclosure would impair DLIR-DCD's ability to obtain such information in the future. Consequently, OIP concludes that the Other Attachments are not confidential commercial and financial information under the impairment prong.

Since the Attachments do not meet the impairment prong for confidential commercial and financial status, OIP now examines whether the Attachments are confidential commercial and financial information under the substantial competitive harm prong. In OIP Opinion Letter Number 98-2, OIP stated that

> Federal courts have explained that commercial and financial information is confidential if disclosure would likely cause substantial competitive harm to the competitive position of the submitters of the information. See National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Although conclusory and generalized allegations of competitive harm are insufficient to prove the likelihood of substantial competitive harm, neither must there be proof of actual competitive harm. GC Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994). Instead, federal courts have found

> that a submitter suffers "substantial competitive harm" when the following facts exist: (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm. Id.

OIP Op. Ltr. No. 98-2 at 12. Thus, OIP needs to review whether Pioneer faces actual competition and whether disclosure would likely cause substantial competitive harm.

A) Actual Competition

Mr. Wong asserted that Requester has requested the Other Attachments "for the purpose of creating an unfair competitive advantage *vis a vis* other plans [Requester] is working with, or attempting to work with." OIP does not question these representations by Pioneer and will assume for the sake of argument that the facts support the claim that Pioneer faces actual competition from Requester.[6]

B) Competitive Harm

Following the analysis of federal courts interpreting the Freedom of Information Act, 5 U.S.C. § 522, OIP has recognized that disclosure of the following causes competitive harm:

> assets, 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.

OIP Op. Ltr. No. 89-13 at 6.

As can be seen from the items listed in OIP Opinion Letter Number 89-13, the information subject to protection is primarily financial in nature or deals with technical processes or proposals. OIP has reviewed the Other Attachments provided for OIP's *in camera* inspection. The Other Attachments include a

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[6] However, OIP notes that the reason a requester seeks government records is generally irrelevant. Agencies are required to make their records available for inspection and copying during regular business hours to "any person." HRS § 92F-11 (2012); HAR §§ 2-71-11(a), -12(a) (2012).

description of the LMOC; limited lists of service providers for medical care, IMEs, vocational rehabilitation, mediation and arbitration; a list of cases which will be handled under the statutory workers' compensation program; an explanation of the ADR program; and forms.

None of the Other Attachments contain any financial data or technical proposals. The Other Attachments do not contain any information regarding the fees, costs or profits for service providers for administrative, medical/health care, IMEs, vocational rehabilitation, ombudsman, and mediation and arbitration services. There is no specific detail concerning any financial gains or benefits for employers approved to participate in the program or for covered employees. Thus, OIP concludes that the Attachments do not contain the types of detailed information that would constitute confidential commercial or financial information for purpose of applying the UIPA's "frustration" exception.

Furthermore, as more fully discussed in the following section, the information in the Other Attachments must be disclosed to all covered employees immediately after the CBWC is approved by the DLIR-DCD. Because the Attachments are widely distributed to the covered employees, OIP does not find evidence that the Attachments are kept "confidential" and concludes that there is no likelihood of substantial competitive harm if the Other Attachments are disclosed to the Requester.

Although OIP assumes, as stated above, that there is actual competition in the workers compensation field, OIP believes that the disclosure of the Other Attachments would not likely cause substantial competitive harm. Thus, OIP concludes that the Other Attachments do not qualify as confidential commercial and financial information under the competitive harm prong and would not qualify for protection as such under the UIPA's "frustration" exception.

III. The Attachments Are Not Trade Secrets

In order to avoid the frustration of a legitimate government function, trade secrets need not be disclosed. OIP Op. Ltr. No. 92-17 at 10. As stated previously in this Opinion, the submitter cannot raise the frustration of a legitimate government function exception to disclosure if the agency does not raise the argument. Even if DLIR-DCD had raised the frustration exception, the facts of this case do not support the finding that the attachments are trade secrets.

The following factors should be considered in determining whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others

> involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 16.

Pioneer will not be able to guard the secrecy of the contents of the CBWC Addendum and the Attachments. Instead, by the terms of the CBWC Addendum, the Addendum and its Attachments must be disclosed to covered employees and to the five unions, two associations and one employer who are signatories to the CBWC Addendum that references the Attachments. Pioneer anticipates that other employers will seek to participate in the Basic Trades CBWC program covered by the CBWC Addendum. As previously noted, the CBWC Addendum states that "[a]ll employees and Individual Employers shall make good faith efforts to expedite resolutions of all matters subject to this Addendum." The covered employees would not be able to make good faith efforts to resolve matters subject to the Addendum unless they had a copy of the CBWC Addendum and the Attachments. Also, Sub-Paragraph A.3. of the Addendum provides that the "the Ombudsman shall receive complaints and inquiries from employees who have filed claims under this Addendum." Again, if the injured workers do not have a copy of the CBWC Addendum and the Attachments, they would not know what their rights and responsibilities were and what complaints or inquiries they could bring to the Ombudsman.

In OIP Opinion Letter Number 92-17, OIP opined that "we find it difficult to believe that a court would find . . . the . . . employee handbook, to be a protected trade secret when copies of the same are presumably provided to all . . . employees." OIP Op. Ltr. No. 92-17 at 17. Similarly here, the distribution of the CBWC Addendum and the Attachments is not limited to a few key personnel and instead, it must be disclosed to all employees of the signatory employer and to employees of employers who are approved by the LMOC to participate in the program. As more employers are approved by the LMOC, the number of employees who receive a copy of the Addendum and the Attachments will grow exponentially. Thus, given the extent to which the information is or will become widely known by employees and other persons, OIP concludes that the CBWC Addendum and the Attachments are not trade secrets.

IV. Conclusion: The Other Attachments Must Be Disclosed

Because the Other Attachments are not protected from disclosure by the UIPA's frustration exception as attorney work product, confidential commercial and financial information, or trade secrets, they must be disclosed to Requester.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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