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BEFORE THE LAND USE COMMISSION OF THE
STATE OF HAWAII

In the Matter of the Petition of:) DOCKET NO. A11-791
)
HG KAUAI JOINT VENTURE, LLC) MEMORANDUM IN OPPOSITION TO
To Amend the Land Use District Boundary of) APPLICANT'S MOTION FOR
Certain Lands Situated at Kapa'a, Island of) PROTECTIVE ORDER
Kauai, State of Hawai'i, consisting of)
approximately 96 Acres, from the Agricultural)
Land Use District to the Urban Land Use)
District, Kauai Tax Map Key 4-3-03: por 01.)

MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR PROTECTIVE
ORDER

Intervenor LIKO MARTIN by and through his undersigned counsel, submit this motion for leave to file a response to Petitioner HG KAUAI JOINT VENTURE, LLC's (HG) motion for protective order, filed November 25, 2020 (HG motion). This motion is filed pursuant to Hawai'i Administrative Rules (HAR) §§15-15-37, -70, and -70.1.

I. ARGUMENT

A. HG failed to carry its burden to support its motion for protective order.

HG seeks a protective order to prevent public disclosure of financial information consisting in HG's statement of assets, liability, and members' equity, and net profit (loss), and "lines of credits with its lenders." HG motion at 1. This information is required to be disclosed to the Commission in order to show that HG "has the necessary economic ability to carry out [its] representations and

commitments relating to the proposed [Hokua Place] development.” HAR §15-15-77(b)(5). HG’s petition is also required to include “[a] statement describing the financial condition the financial condition together with a current certified balance sheet and income statement[.]” HAR §15-15-50(c)(9). HG may “request a protective order” to protect confidentiality of these documents if “such information is protected from disclosure under chapter 92F, HRS.” *Id.* Under the Commission’s procedures for requesting a protective order:

Any party or any person may move for a protective order to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by other law. A motion for protective order shall specifically identify the document or information to be protected. The movant shall bear the burden of establishing that the information should be protected. . . .

HAR §15-15-70.1. HG does not establish entitlement to protection from disclosure under HRS chapter 92F, the Hawai‘i Uniform Information Practices Act (UIPA) and rather refers to general law regarding a “right to privacy” pursuant to article I, §6 of the Hawai‘i Constitution and Rule 26 of the Hawai‘i Rules of Civil Procedure (HRCP). HG motion at 3.

B. HG does not establish its asset, liability, and net profit (loss) sheets and other corporate financial documents as highly personal and intimate information.

HG does not discuss UIPA but rather cites case law addressing rights to privacy, article I, §6 of the Hawai‘i Constitution, and Hawai‘i Rules of Civil Procedure (HRCP) Rule 26(e).¹ HG motion at 3-4. UIPA implements article I, §6 of the Hawai‘i Constitution. *State of Hawai‘i Organization of Police Officers (SHOPO) v. Soc’y of Professional Journalists-University of Hawai‘i*, 83 Hawai‘i 378, 396, 927 P.2d 386, 404 (1996).

HRS §92F-2 provides a balancing test under which “[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and 7 of Article I of the Constitution of the State of Hawaii.” *Id.* However, article I, §6 “relates to privacy in the informational and personal autonomy sense.” *SHOPO*, 83 Hawai‘i at 397, 927 P.2d at 405 citing Stand. Comm. Rep. No. 69, in Proceedings of the Constitutional Convention of Hawaii of 1978, Vol. I, at 674.

Information submitted in the course of HG’s application for a highly public and profitable

¹ Even assuming HG intended to cite HRCP Rule 26(c), which governs protective orders in the course of discovery between parties in judicial proceedings, and not HRCP Rule 26(e), such provision is inapplicable. Information HG seeks to protect is not sought in discovery but as part of Commission proceedings mandated under HRS chapter 205.

amendment to the State land use paradigm does not fall within the protection of Hawai'i's constitutional right to privacy. “[T]he privacy right protected by the 'informational privacy' prong of article I, section 6 is the right to keep confidential information which is 'highly personal and intimate.’” *SHOPO*, 83 Hawai'i at 398, 927 P.2d at 406 (personal misconduct is not highly personal and intimate information) quoting *Painting Industry of Hawaii Market Recovery Fund v. Alm*, 69 Haw. 449, 453, 746 P.2d 79, 81-82 (1987).

“UIPA's privacy exception when applicable, only protects information concerning ‘individuals.’” Office of Information Practices (OIP) No. 90-21 at 14.² “Under the UIPA, only ‘natural persons’ have cognizable privacy interests.” *Id.* quoting HRS §§ 92F-3 and 92F-14(a) (Supp. 1989). “Thus, information concerning a corporation, no matter how sensitive, is not protected from disclosure under section 92F-13(1), Hawaii Revised Statutes.” *Id.* citing HRS §92F-13(1) (“Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy”). HG is not a private person and its financial records are material to a Commission decision that substantively concerns public interests. HG does not establish its right to protective order under a “fundamental right to privacy.”

C. UIPA does not support HG's motion for protective order.

UIPA makes clear that all government records are open to public inspection except when access is restricted or closed by law. HRS §92F-11(a). “Except as provided in [HRS] section 92F-13, each agency upon request by any person shall make government records available for inspection and copying[.]” HRS §92F-11(b). A “government record” means “information maintained by an agency in written, visual, auditory, electronic, or other physical form.” HRS §92F-3.

Here, HG seeks to submit information in its district boundary amendment (DBA) application to the Commission that, upon acceptance of that application, such information would be a “government record” maintained by the Commission. *Compare Nuuanu Valley Ass'n v. City of Honolulu*, 119 Hawai'i 90, 97, 194 P.3d 531, 538 (2008) (discussing whether government records were maintained by the agency pursuant to HRS § 92F-11). HG therefore has the burden of establishing entitlement to an exception under HRS §92F-13 and has not done so.

² OIP “is the agency charged with administering the Sunshine Law.” *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City of Honolulu*, 144 Hawai'i 466, 467, 445 P.3d 47, 57 n.4 (2019) citing HRS § 92-1.5 (2012). “Opinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous.” *Id.* quoting HRS § 92-12(d).

D. HG did not establish entitlement to protection for commercial or financial matters.

OIP has relied on Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. § 552 (FOIA) and case law interpreting this provision to determine whether an audit prepared by an independent accounting firm at the request of the Office of the Governor for a nonprofit corporation constituted “confidential commercial and financial information” that would be exempt from disclosure. OIP Opinion No. 90-21 at 2.

[C]ommercial or financial matter is "confidential" for purposes of this exemption if disclosure is likely to have either of the following effects: (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.

OIP Opinion No. 90-21 at 11 quoting *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also* OIP Op. Ltr. No. 90-3 at 9 (Jan. 18, 1990); OIP Op. Ltr. No. 89-5 (Nov. 20, 1989). Under the first prong, OIP notes disclosure of commercial and financial information will not impair the government's ability to obtain necessary information in the future, where submission of such information is mandatory. OIP Opinion No. 90-21 at 11 *citing* *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 n. 143 (D.C. Cir. 1987) (impairment not established where submission of the information is mandatory); *cert. denied*, 108 S. Ct. 1270 (1988). HG’s submission of financial information is a required part of its DBA application and there would be no impairment to the Commission’s ability to obtain information that applicants are mandated to disclose. *See* HAR §15-15-50(c)(9).

Under the second prong, HG did not carry its burden of establishing disclosure would cause substantial harm to its competitive position. HG conclusorily asserts that if its:

financial information, including the terms under which lenders have agreed to extend lines of credit to [HG], is not protected, it would immediately and effectively place [HG] at a competitive disadvantage in obtaining a construction loan or other lines of credit if that information is divulged to lenders to whom [HG] has applied for financing.

HG motion at 3 citing Declaration of Theresa Roche ¶4. “[T]he party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” OIP Opinion No. 90-21 at 12 quoting *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985); *see also* OIP Op. Ltr. No. 89-5 at 17 (Nov. 20, 1989).

HG has not established that a protective order would comply with HRS chapter 92F. Therefore, any stipulation from other parties cannot permit public records to be designated

confidential in violation of HRS chapter 92F. *See* HG motion at 2 (noting agreement from the Office of Planning to a protective order).

II. CONCLUSION

For the foregoing reasons, Intervenor respectfully requests that this Commission deny HG's motion for protective order, filed November 25, 2020.

DATED: Makawao, Hawai'i

January 6, 2021



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) CERTIFICATE OF SERVICE
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)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document was served on the following via email pursuant to the Executive Director's email dated December 15, 2020:

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DATED: Makawao, Hawai'i

January 6, 2021



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