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LESLIE H. KONDO
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December 29, 2005

VIA E-MAIL: cslater@lava.net

Mr. Cliff Slater
3105 Pacific Heights Road
Honolulu, Hawaii 96813

VIA FACSIMILE NO: 587-2018

Mr. Gordon G.W. Lum
Executive Director
Oahu Metropolitan Planning Organization
Ocean View Center, Suite 200
707 Richards Street
Honolulu, Hawaii 96813-4623

Re: Request for Assumptions and Calculations
U RFA-P 05-46

Dear Messrs. Slater and Lum:

This letter confirms our receipt of Mr. Gordon Lum's response, on behalf of the Oahu Metropolitan Planning Organization ("OMPO"), to our letter of December 14, 2005. This letter constitutes our opinion concerning Mr. Cliff Slater's appeal of OMPO's denial of his request to access certain government records maintained by OMPO.

From the information that has been provided to us, we understand that, on or about December 6, 2005, Mr. Slater submitted to OMPO a Request to Access a Government Record seeking the disclosure of:

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All records detailing the assumptions and calculations used to forecast Daily Transit Ridership for 2030 on page 7 of OMPO's "Planning in Motion" for the 2030 ORTP.

On that same date, OMPO denied Mr. Slater's request, stating that disclosure of the requested records would lead to the frustration of a legitimate government function. OMPO cited section 92F-13(3), Hawaii Revised Statutes ("HRS") (the "frustration exception"), as the authority supporting its denial of Mr. Slater's request. Mr. Slater then appealed OMPO's denial to the Office of Information Practices ("OIP").

In its response to our request, OMPO explained that its consultant, Kaku Associates ("Kaku"), developed the Daily Transit Ridership forecast ("ridership forecast") contained in the "2030 Oahu Regional Transportation Plan Strategic Plan Concepts" brochure and used "Appendix A Travel Demand Forecasting Model Coding" ("Appendix A") "as the basis for forecasting the daily transit ridership in the brochure." OMPO, however, claimed that the conclusions in the brochure, which we assume was meant to include the ridership forecast, are "intuitive" and characterized Appendix A as a "draft working paper that contains [Kaku's] interpretation/opinion of the parameters of the various projects coded into [OMPO's] travel forecasting model." OMPO asserted that "[t]he parameters may or may not correctly describe the projects as determined by OMPO and/or the agencies that will be responsible for these projects." OMPO also represented that "projects are also being dropped, modified, or added as the [Oahu Regional Transportation Plan] progresses." OMPO provided a copy of Appendix A to us for our confidential *in camera* review.

From OMPO's letter, we understand OMPO to be claiming that Appendix A may be withheld under the deliberative process privilege ("DPP"), which is part of the frustration exception.¹ DPP allows an agency to withhold from disclosure "recommendations, draft documents, proposals, suggestions, and other subjective documents' that comprise part of the process by which the government formulates decisions and policies." OIP. Op. Ltr. No. 04-15 at 4 (quoting OIP Op. Ltr. No. 90-8 at 4 (citation omitted)). To qualify for protection under DPP, "the document must be 'predecisional,' i.e., received by the decision-maker prior to the time the agency decision or policy is made" and "must be 'deliberative,' i.e., a recommendation or opinion on agency matters that is a direct part of the decision-making process." *Id.* If, however, the document is expressly adopted or incorporated by reference into the

¹ OMPO claims that, because it has not verified the project codes, disclosure of Appendix A could mislead the public if the codes are in error. Because we have concluded that Appendix A reflects Kaku's subjective assumptions and interpretations and, therefore, falls within DPP, we need not address OMPO's argument that its function would be frustrated by disclosure of erroneous information.

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final agency decision or policy, the record may lose its protection from disclosure. Id. at 5. Moreover, DPP generally does not protect purely factual material from disclosure.

As we previously have explained:

[t]he privilege protects the quality of agency decision-making, specifically, by encouraging subordinates to provide uninhibited opinions and recommendations to decision-makers without fear of public ridicule or criticism; by protecting against premature disclosure of proposed policies or decisions before they are finally formulated or adopted; and by protecting against any confusion of the issues and misleading of the public that might be caused by dissemination of documents suggesting reasons and rationales that are not in fact the ultimate reason for an agency's action.

OIP Op. Ltr. No. 04-15 at 4.

Here, Appendix A identifies over 100 transportation-related projects, which include improvements to existing roadways, construction of new traffic-related projects, and construction of various rail rapid transit projects. Appendix A also includes a brief description of each project and lists a number of codes, called "nodes" and "links," which, as we understand OMPO's assertion, more fully describes each project's "parameters."

From OMPO's response, we do not understand the transportation projects identified in Appendix A to be ongoing or existing projects; rather, it is our understanding that they are proposals that have been developed and are being considered by OMPO, as far as Kaku believes, for use in the Oahu Regional Transportation Plan. It is also our understanding that the process of deciding which transportation projects to include in the Oahu Regional Transportation Plan is ongoing.

Based upon our understanding and OMPO's representation that the transportation projects could be "dropped, modified, or added" as the process of developing the Oahu Regional Transportation Plan continues, we agree that Appendix A is predecisional and deliberative in nature. In our opinion, Appendix A is a "working" document, based upon Kaku's understanding of the possible projects that OMPO has developed and is considering for inclusion in the Oahu Regional Transportation Plan, that may change as projects are "dropped, modified, or added" by OMPO. In other words, we view Appendix A to be OMPO's preliminary ideas and suggestions, as interpreted by Kaku, which is part of OMPO's process in

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creating the Oahu Regional Transportation Plan. Therefore, it is our opinion that Appendix A falls within DPP.

Although Kaku indicated that Appendix A was "the basis" for its ridership forecast contained in the brochure, from our review of Appendix A, we cannot reasonably conclude that any of the information contained therein was incorporated into the brochure in such a way as to waive the privilege. Stated differently, Appendix A does not contain any traffic, rail or other numbers, including projections, from which we can reasonably determine correlates to the ridership forecast figures. As OMPO stated, which, based upon our review of Appendix A we tend to agree, the figures are "broad and intuitive." Accordingly, assuming, as OMPO has represented, that Appendix A is the only document responsive to Mr. Slater's record request, it is our opinion that OMPO's denial of Mr. Slater's request was consistent with the UIPA.

We trust that this fully resolves the issue raised by Mr. Slater's appeal to OIP, and we are closing our file relating to this matter. If you have any questions or would like to discuss this matter further, please do not hesitate to contact us.

Very truly yours,



Winteahn K. T. Park
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

WKTP: nkb