



Chamorro Land Trust Commission

P.O. Box 2950 Hagåtña, Guam 96932

Phone: 475-4251 Fax: 477-8082

March 21, 2005

MEMORANDUM

Felix P. Camacho
Governor of Guam

Kaleo S. Moylan
Lieutenant Governor of Guam

Thomas A. Elliott
Administrative Director

Commission Members

Delfin R. Damian, Jr.
Chairman

Annie R. Perez
Commissioner

David J. Matanane
Commissioner

Oscar A. Calvo
Commissioner-Appointee

To: Felixberto Dungca, Jr.
Ypao Point Project Manager

Fr: Administrative Director

Re: Request for Information IAW Sunshine Act.

As per attached, Attorney Michael Phillips has submitted a request to examine and/or copy all records pertaining to the Ypao Point development project. Please provide copies of all records generated or maintained by you as Project Manager for Ypao Point.

Thank you for your cooperation.



Thomas A. Elliott

Cc: CLTC Board

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March 15, 2005

Delfin Damian, Chair
Chamorro Land Trust Commission
Old Corn Building, Anigua
P.O. Box 2950
Hagåtña, Guam 96932

Tom Elliot, Administrative Director
Chamorro Land Trust Commission
Old Corn Building, Anigua
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FREEDOM OF INFORMATION REQUEST / DEMAND FOR OPEN GOVERNMENT

Buenas!

Pursuant to the authority of 5 G.C.A. Section 10103, I request access and the ability to inspect and copy all public records relating to the attempted lease, lease, or sale by the Chamorro Land Trust Commission or Guam Economic Development and Commerce Authority of Chamorro Homelands collectively referred to as "Oka Point," "Ypao Point, or "Old Hospital Point." Please prepare for inspection and copying all writings containing such information prepared, owned, used, or retained in any manner or format by the Chamorro Land Trust Commission. 5 G.C.A Section 10106 requires the Commission maintain previous established written guidelines for accessibility of records stating the procedures to be followed when making its records available. Should the Commission assert any documents are exempt from disclosure, I request the Commission also produce the list of records previously established as exempt by the Commission and accompanying guidelines as required by 5 G.C.A. Section 10106(a) and (b).

According to public statements by Commission officials, the Commission continues to meet in secret while discussing the long-term lease of the largest income-earning asset within its inventory. While Commission officials continue to allege unspecified procurement laws allow for secret meetings, these same

" I Erensia, Lina'la', Espiritu-ta "

officials continue to release selected portions of information surrounding the lease. 5 G.C.A. Section 8103 prohibits secret meetings or executive sessions under these circumstances. With few, specific exceptions, "every meeting of a public agency shall be open and public, and any person shall be permitted to attend any public agency meeting." 5 G.C.A. Section 8103(a). There are no exceptions provided for lease negotiations. 5 G.C.A. Section 8111. Furthermore, the Open Government Law contains no exception to strict notice requirements aside from an emergency. I request you include and provide all notices of any and all Commission meetings within the last sixty (60) days.

Guam Procurement laws do not authorize secret negotiations and in fact mandate just the opposite. The right of nondisclosure is limited to one Section within the Procurement laws dealing specifically with a bidder or offeror supplying information for the purpose of remedying a non-responsive bid:

§5230. Responsibility of Bidders and Offerors.

- (a) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the Policy Office. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.
- (b) Right of Nondisclosure. Information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the General Services Agency, the Department of Public Works or the purchasing agency without prior written consent by the bidder or offeror, but may be disclosed to the Attorney General at any time. (Emphasis added)

The right of "nondisclosure" is limited to "this Section" dealing specifically with information submitted in response to an inquiry concerning responsibility. This exception does not apply to conforming/winning bids or requests for proposals. Guam Procurement laws (contained in Title 5) require extensive measures to ensure both the recording and availability of information concerning procurement and related negotiations:

§5249. Record Of Procurement Actions. Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

- (a) the date, time, subject matter and names of participants at any meeting including government employees that is in any way related to a particular procurement;
- (b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- (c) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- (d) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and
- (e) the requesting agency's determination of need.

§5250. Certification of Record. No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by §5249 of this Chapter and that it is complete and available for public inspection. The certificate is itself a part of the record.

§5251. Public Record. The record required by §5249 of this Chapter is a public record and, subject to rules promulgated by the Procurement Appeals Board, any person may inspect and copy any portion of the record.

The only recognizable exception would be "trade secrets." 5 G.C.A. Section 5252 provides in its entirety:

Rules for Procurement Records. The rules promulgated pursuant to §5251 of this Chapter shall:

- (a) protect the integrity of the bidding process;
 - (b) protect the confidentiality of trade secrets;
 - (c) establish reasonable charges for copying papers;
 - (d) provide for transcription of sound recordings;
 - (e) require public access to the record at the earliest possible time;
- and
- (f) not require that the record be complete or that the procurement award be made before inspection and copying are permitted.
(Emphasis added)

Guam law has defined "trade secret" as follows:

Trade Secret means the whole or any portion of phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and is not generally available to the public, and which gives one who uses it an advantage over actual or potential competitors who do not know of or use the trade secret, or the contents of private and unpublished records used in the business of examining, certifying or insuring titles to real property. Proof that the owner takes measures to prevent information from becoming available to persons other than those selected by the owner to have access thereto for limited purposes gives rise to an inference that the information is secret.
9 G.C.A Section 43.10(f)

One authority writes, "One of the most carefully protected trade secrets today is the precise chemical formulation for Coca-Cola brand soft drink. ...Knowledge of failed experiments, -variations in chemical formulations, and assembly tricks are all examples of valuable information routinely licensed by universities." University of Virginia, Patent Foundation, Policies and Forms. Black's Law Dictionary, Sixth Edition, refers to formulas, patterns, etc. used in business to obtain an advantage over competitors. "A plan or process, tool, mechanism, or compound known only to its owner and those of his employees to whom it is necessary to confide it. A secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value. "

See Guam Radio Services, Inc., d/b/a KOKU-FM Hit Radio100 v. GEDA, 2000 Guam 1, p.5 (Sunshine Act applies to private writings kept as public records, and all procurement data except for "trade secrets" which require the Policy Office to first determine such material is a trade secret of the person or entity submitting the material). In Sky Enterprise v. Kobayashi, 2003 Guam 5, ¶11, the Supreme Court of Guam ruled:

When the language of a statute is unambiguous, the analysis stops there. Topasna v. Superior Court, 1996 Guam5, ¶19. If the legislature intended to provide corporations with the protections available at common law, it would have written those protections into the statute. See Castro v. Peck, 1998 Guam 2, ¶¶ 15-16 (refusing to read into a statute "a provision which the Legislature could have provided, but did not"). As we have previously held, "it is not this court's function to legislate those protections by implication." Paulino v. Biscoe, 2000 Guam 13 ¶ 28 (referring to the absence in

Guam law of certain protections extended to mortgagors in California and declining to grant those protections not provided for by statute “[u]nless and until the Guam Legislature sees fit to provide [them]”); see also Bank of Guam v. Reidy, 2001 Guam 14, ¶22 (“[J]udicial legislation ... is clearly not the prerogative of the courts.”); People v. Villapando, 1999 Guam31, ¶ 54 (“[I]t is within the purview of the Legislature to make statutory changes to an ill-conceived statutory scheme.”); People v. Palomo, 1998 Guam 12, ¶ 17 (“Although a harsh result may occur, the problem exists not within the judicial system, but instead with the Legislature where the sole remedy lies in the amendment to or repeal of[the statute in question].”). We will not create an exception in a statute where none exists.

See also, Guam Publications, Inc., dba Pacific Daily News v. Government of Guam Retirement Fund, 1999 Guam 29.

This Freedom of Information request does not solicit trade secrets. The People of Guam are not interested in “how” a lessee is going to fulfill the planned construction and development on Oka Point but instead at the very least demand to know exactly “what” is planned and the amount of money to be paid as rental for the most financially valuable portion of Chamorro Homelands available in the Land Trust inventory. We should not have to wait for the promised “good news” to arrive after the Commission has already entered into a lease.

The Open Government Law of Guam explains:

Policy. The Legislature declares it is the policy of this Territory that the formation of public policy and decisions is public and shall not be conducted in secret. The people of Guam do not yield their individual rights to the public agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.
5 G.C.A. §8102.

Finally, Guam Procurement laws provide for the cancellation of proposed awards in the event of violation of law:

§5451. Remedies Prior to an Award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

§5485. Complaints that Procurement Data was Withheld.

(a) On complaint by any member of the public, the Superior Court has jurisdiction to enjoin a governmental body from withholding procurement data and to order the production of any government data improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such procurement data in camera to determine whether such records or any part thereof shall be withheld under any of the exceptions set forth in 6 GCA §4202 and the burden is on the agency to sustain its action.

(b) Notwithstanding any other provision of law, the government or a governmental body shall serve an answer or otherwise plead to any complaint made under this Section within thirty (3) days after service of the pleading in which such complaint is made, unless the court otherwise directs, for good cause shown.

Public Law 25-179 granted to the Commission the power to lease *Old Hospital Point* for commercial purposes under a general lease at fair market value. The Commission earlier determined and advertised its intention to lease the property to a tourism developer for the specific purpose of constructing a hotel and/or convention center. The Guam Economic Development and Commerce Authority advertised the sale of the property for this specific purpose. See <http://www.investguam.com/lis/lis017.pdf>. The Guam Legislature mandated "substantial development" of the planned commercial construction on the property occur within two (2) years of lease execution. The law also demands the developer proceed during this same time period with "preliminary construction operations, which include preparing plans or drawings, clearing and grading or excavating, pouring concrete for foundations, and [testing] borings to determine the subsoil." If the developer fails to complete this work, the Commission is authorized to revoke the lease.

There is no doubt whatsoever all parties involved intended and understood the lease to be for the extensive development of prime, Tumon property. The "fair market value" and eventual lease of the Trust Property must include this value and not allow for vacant, undeveloped, underused rates or appraisals. Any attempt to execute a lease for a lesser amount would be an extreme breach of both the authorizing legislation and the Commission Members' fiduciary obligations as trustees. Likewise, the trade-off of rent for other "benefits" not completely and exclusively flowing to the benefit of Chamorro Land Trust beneficiaries is prohibited under law.

Public Law 23-038 approved Rules and Regulations for the operation of the Commission, for residential and agricultural leases, but failed to approve any rules or regulations governing commercial leases as required under the Act. Public Law 24-220 approved rules and regulations governing loans and funds. It does not appear the Commission has complied with its legal mandate to pass the remaining rules and regulations, which, if approved by the Legislature, would govern the leasing of commercial properties. P.L. 23-038 also addressed each Member's duties and responsibilities:

Mission of Trustees. The commission members, as trustees, shall: act exclusively in the interest of beneficiaries under the Act; hold and protect the trust property for beneficiaries under the Act; maintain and uphold their fiduciary responsibilities to the beneficiaries, and exercise such care and skill as a person of ordinary prudence would exercise in dealing with one's own property in the management of Chamorro homelands; and, adhere to the terms of the trust as set forth in the Act.
(Emphasis added)

For quite some time the Commission has remained short of members. It does not appear the Commission has taken the steps necessary to properly adopt rules and regulations prior to entering into a commercial lease. A question remains unanswered as to whether the Commission's Administrative Director could conduct discretionary Commission business without at least a quorum of nominated and confirmed Commission Members. 21 G.C.A. Section 751202(a) states in relevant part, "The Commission shall be composed of five members to be appointed by the Governor with the confirmation of the Legislature." 751202(b) places authority over the hiring of the Administrative Director with the Commission, and not with the Governor or other hiring authority. If the Commission has such authority to act in absence of a quorum, or the Administrative Director has legal authority to act outside the existence of the Commission, I request you provide such authority along with the other information above. Likewise, if the Commission has completed and the Legislature has approved rules and regulations for the issuance of commercial leases, please provide copies of the approved commercial lease rules and regulations.

Public Law No. 25-179 authorized the Commission to lease Oka Point through a commercial lease. P.L. 25-179, Section 4. This law did not amend or repeal any provisions of the Chamorro Land Trust Act. Because the proceedings have remained secretive and have not provided for either public input, review, or even simple observation, one can only speculate as to whether the Commission intends to honor 21 G.C.A. Sections 75107(a) and 75108(a) mandating leases of Chamorro Homelands go to Chamorros. Furthermore, the

secrecy has also contributed to speculation the Commission may in fact be using incorrect lot numbers.

The same enabling legislation (P.L. 25-179) mandated the Commission first be operating before the lease process could even begin! There appears to be a glaring violation of the statute, and no authority to act absent a Commission able to act through quorum:

Prior to proceeding with the negotiated lease process, the Commission shall establish a Task Force, comprised of nine (9) members, to explore the potential development schemes. The Task Force shall be chaired by the Administrative Director of the Commission, or in the Director's absence, the Deputy Administrative Director. The Vice Chair shall be the Administrator of GEDA, or in that person's absence, the Deputy Administrator. The balance of the membership shall be selected as follows:

(1) one (1) member who is qualified to participate in the Chamorro Land Trust program to be selected by I Maga'lāhen Guåhan;

(2) one (1) member who is qualified to participate in the Chamorro Land Trust program to be selected by the Speaker of I Liheslaturan Guåhan;

(3) two (2) members shall be selected from among the GEDA Board of Directors;

(4) two (2) members shall be selected from among the membership of the Commission; and

(5) the ninth (9th) member shall be selected by the eight (8) members of the Task Force, in which such member shall continue to serve until a development scheme is adopted by the Task Force.

I trust the Commission and all parties to the ongoing negotiations appreciate the seriousness of their current actions. Both the Sunshine Act and Open Government laws impose misdemeanor penalties for violators. I respectfully request the Commission honor and respond quickly to my Sunshine Act Request and demand for open government, and all parties abide by the laws reviewed above.

Douglas B. Moylan
Attorney General



Joseph A. Guthrie
Deputy
Solicitors Division

Office of the Attorney General

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January 6, 2005

Memorandum

Ref: CLTC 04-1151

To: Executive Director, Chamorro Land Trust Commission

From: Attorney General

Subject: **Development Agreement and Ground Lease Agreement with Himalaya Holding Group**

I reviewed drafts of the Development Agreement (DA) and the Ground Lease Agreement (Lease) I received on December 13, 2004, and have only a few comments:

1. **DA, paragraph 7.1 "Beautification of Surrounding Areas"**: The developer is agreeing to undertake repairs and improvements to several different areas outside of the Project Premises and provide space for a shrine and museum on the Project Premises, but no time frame within which these repairs and improvements must be undertaken is stated. Failure to make these repairs and improvements (except for those which are located on the leased property) are also not made events of default in paragraph 9.1. For the protection of both parties and so that there is no misunderstanding later on, I suggest that a deadline be stated in paragraph 7.1. This is only a recommended suggestion, and need not be done because it does not reflect on my review as to the legality and form of this contract.
2. **DA, paragraph 10.1 "Force Majeure"**: Standard paragraphs on force majeure are meant to cover events which are beyond the control of the parties. Years ago, these paragraphs were limited to acts of God, but events of force majeure have been expanded over the years to cover manmade events not caused by the parties. The only event I question is, in subparagraph (a), the "inability to procure materials". If the developer's purchasing agent forgets to pre-order important materials, then apparently that would be an excused "inability to procure materials". Only the inability

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To: Executive Director, CLTC

Re: Development Agreement and Ground Lease Agreement with Himalaya Holding Group



to procure materials which is not directly or indirectly caused by the developer should be excused. Again, this is only a recommended suggestion, and need not be done because it does not reflect on my review as to the legality and form of this contract. (The same language is included in the Lease in paragraph 13.1(a).)

3. **DA, Exhibits:** According to the list of exhibits at the end of the table of contents, Exhibit B is supposed to be the Lease and Exhibit C is supposed to be a description of the Components of Improvements. In paragraph 2.5(a), the DA erroneously describes the Lease as being attached as Exhibit C.
4. **Lease, paragraph 2.1 "Demised Premises":** I understand according to paragraph 16.3 that this Lease will not be recorded, but a "short form" may. The Lease's description of the premises does not contain a statement as to the availability of water or power. This is just a reminder that pursuant to 21 GCA §60314, the short form version will have to contain such a statement.
5. **Lease, paragraph 2.2 "Initial Term":** I trust the dates in this paragraph will be changed in the final signed version.
6. **Lease, paragraph 9.2 "Fee Subordination by Landlord":** This paragraph provides that the CLTC must execute a mortgage if requested by the developer. I trust that the decision to allow this was made by the Commission pursuant to P.L. 25-179:4(a) which provides "A commercial lease may be disposed of through negotiation, subject to findings by the Commission that such is, at a minimum, compliant with their terms and conditions." When sending us the final version of this Lease and the DA, please provide us with the minutes from any Commission meetings at which any findings and the terms and conditions for this Lease were made. For a condition as important as a mortgage, a finding specific to the mortgage would have to have been made.
7. **Lease, paragraph 14.9 "Costs of Litigation":** This paragraph provides that if a lawsuit is brought against one party without any fault on its part, by the other, then the party at fault shall pay all costs and expenses, including attorneys' fees of the other. For certain suits brought by the developer, the Government Claims Act would apply, and the Act at 5 GCA §6301 provides that the government is not liable for an opposing party's

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attorneys fees except under one limited circumstance. To this extent, paragraph 14.9 should be clarified.

Otherwise, I found both contracts to be carefully drafted, with all the usual details in similar contracts, and can recommend approval by the Attorney General when the final signed versions are submitted.

OFFICE OF THE ATTORNEY GENERAL
DOUGLAS B. MOYLAN, ATTORNEY GENERAL OF GUAM

By:

A handwritten signature in cursive script, appearing to read "Deborah Rivera".

DEBORAH RIVERA
Assistant Attorney General

cc: Director, DLM